Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (*formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court may deny compensation for a categorical taking by invoking a new and expansive conception of the public trust doctrine, thereby disregarding the limits placed by this Court's regulatory takings decisions on the definition of a background principle of law.

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PETITION FOR A WRIT OF CERTIORARI

Sam B. McQueen respectfully petitions this Court for a writ of certiorari to review the judgment in this action of the Supreme Court of South Carolina.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina is reported at 580 S.E.2d 116 and is reprinted in the appendix hereto ("Pet. App.") at 1a.

JURISDICTION

The judgment of the Supreme Court of South Carolina was entered on April 28, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the Constitution of the United States declares: "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment, section 1, provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

INTRODUCTION

The Supreme Court of South Carolina has defied this Court's order to reconsider this regulatory takings case in light of *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). On remand, the South Carolina court directed the parties to brief and argue unrelated issues and denied compensation once again for an admitted "total taking." Pet. App. 4a. By denying compensation based on a new and expansive conception of the public trust doctrine, the lower court disregarded the limits placed by this Court on the definition of a background principle of law.

In *McQueen* v. *South Carolina Department of Health and Environmental Control, Office of Ocean & Coastal*

Resource Management, 533 U.S. 943 (2001), the Court issued an order granting certiorari, vacating the judgment of the South Carolina court, and remanding "for further consideration in light of *Palazzolo* . . . ." *Id.* at 8a. Rather than complying with this grant-vacate-and-remand ("GVR") order, the South Carolina court directed the parties to brief unrelated issues; denied a motion to amend the briefing order so that the extent of *Palazzolo's* effect on the initial judgment could be addressed; and rested its final judgment on the public trust doctrine, which the court applied in this case for the first time on remand, without reconciling its denial of compensation with the holding or reasoning of *Palazzolo*.

The South Carolina Supreme Court's judgment is irreconcilable with this Court's regulatory takings decisions. The South Carolina court acknowledged that Petitioner Sam B. McQueen ("McQueen"), like the owner in *Lucas*, has suffered "a total taking." *Id.* at 4a. Yet the court denied compensation based on a novel and expansive conception of the public trust doctrine. That rule supposedly allows the state to assert "the exclusive right to control land below the high water mark for the public benefit" and to prohibit "activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a. The court invoked this sweeping rule to justify the uncompensated confiscation of two small residential lots, situated in a fully-developed neighborhood, whose status as tidelands is largely based on the presence of certain species of plants that the government has conceded are "well established in a season." R. 175.[1]

The conflict with this Court's decisions is particularly acute because the South Carolina court failed to mention, much less apply, the objective criteria for a relevant

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[1] Citations to "R" refer to the official Record on Appeal.

background principle of law set forth in *Lucas* and *Palazzolo*. Indeed, the court made no attempt to reconcile its conception of the public trust doctrine as a background principle of law with South Carolina's historic reliance on the private ownership of tidelands. *See State* v. *Hardee*, 193 S.E.2d 497, 503–04 (S.C. 1972) (Bussey, J., concurring). The decision below threatens to nullify *Lucas* by encouraging lower courts to deny compensation based on dubious legal principles. This Court's review is therefore necessary to assure the continuing vitality of *Lucas*.

STATEMENT OF THE CASE

1. This case presents a claim by McQueen for "just compensation," as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. *See Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 241 (1897). Since October 1994 a final regulatory order has permanently deprived him of the right to use his land. R. 17. Nonetheless, South Carolina refuses to compensate him for what the South Carolina Court of Appeals has rightly called "a textbook taking." Pet. App. 34a.

In 1961 and 1963 McQueen bought two small noncontiguous lots of real property in fee simple, located in North Myrtle Beach, South Carolina. R. 244–45, 255–56, 2. Since buying these lots, McQueen has regularly paid taxes on them. *Id.* at 2. When purchased, the property was zoned for residential use, and McQueen later testified that "[w]hen I get financially able I would like to build a house on one of them." *Id.* at 243, 206. Next to each parcel runs a manmade saltwater canal. *Id.* at 12. Lots surrounding McQueen's property have houses

and bulkheads,[2] which guard the land from erosion by the canals. *Id.* at 3, 335. McQueen's lots are two of the only empty plots of land left in that area of town. *Id.* at 2.

In 1977, more than a decade after McQueen bought his land, South Carolina enacted the Coastal Zone Management Act ("CZMA"). S.C. Code Ann. §§ 48-39-10–220 (1994). Its aims were "to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State." *Id.* at § 48-39-30(A). The CZMA makes it unlawful to "fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit . . . ." *Id.* at § 48-39-130(C). Building "any structure" in a "critical area" is a crime. A first offense carries a sentence of up to six months' imprisonment and a $5000 fine; each additional offense potentially carries one year's imprisonment and a $10,000 fine. *Id.* at § 48-39-170(A). The CZMA also authorizes civil penalties of $100–$1000 per day of violation. *Id.* at § 48-39-170(C).

In compliance with the CZMA, McQueen applied on July 12, 1991 with the OCRM for permits to construct a bulkhead on each lot for erosion control. R. 2–3, 237, 251. On January 21, 1992 the OCRM issued a permit for one lot[3] but failed to respond to McQueen's permit application on the other. *Id.* at 3, 223. In a letter dated April 2, 1993, 21 months after he submitted his original permit applications, the OCRM instructed McQueen that "the

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[2] A bulkhead is defined by statute as "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C. Code Ann. § 48-39-270(1)(b) (2003).

[3] This January 1992 permit was statutorily out of time, because it was issued more than 90 days after McQueen filed his application. S.C. Code § 48-39-150(c) (1994). Indeed, the OCRM never met this mandatory deadline for any application in this case. R. 3, 4.

only way to correct this confusion" was to "submit a new application." *Id.* at 353 (emphasis added).

Undeterred by the OCRM's errors, McQueen reapplied on June 4, 1993 for permits to construct bulkheads and to add fill behind the bulkheads for "a level surface on which to build." *Id.* at 287, 280, 313. The OCRM denied these applications on September 13, 1993.[4] *Id.* at 283, 316, 4. No permits would be issued, the agency said, because "[t]he proposed bulkhead is located well into the tidelands critical area, so that any backfill results in the filling of tidal wetlands." *Id.* at 283, 316. McQueen's lots were deemed "tidal wetlands" based on the presence of saltwater tolerant plants, *id.* at 152–54, 159, which the OCRM admitted can become "well established in a season," *id.* at 175, and tidal flow on portions of one lot. *Id.* at 166–67. Denying the permits was also based on the "cumulative impact" of letting similarly situated owners build a bulkhead and add backfill to land like McQueen's. *Id.* at 162, 171. The OCRM further stated that "since the application seeks to fill a single family lot, there is no overridding [sic] public interest for this activity." *Id.* at 283, 316. As the OCRM later conceded, its denial of the permits had the effect of totally prohibiting development on McQueen's land. *Id.* at 146–47, 199–200.

McQueen pursued administrative appeals that ended with a "Final Administrative Order," which the Coastal Zone Management Appellate Panel issued on October 7, 1994. *Id.* at 17. The Panel upheld the OCRM's original

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[4] Out of the gauntlet of agencies whose permission the law required McQueen to obtain—the U.S. Army Corps of Engineers, the South Carolina Department of Health and Environmental Control, the South Carolina Ports Authority, the South Carolina Department of Archives and History, and the South Carolina Department of Wildlife and Marine Resources—only the OCRM refused McQueen permission to construct bulkheads. R. 283, 316, 4.

permit denials and rejected McQueen's claim that this action imposed a taking. *Id.* at 22–23.

2. McQueen filed a complaint in the South Carolina Court of Common Pleas, *id.* at 31; *see* S.C. Code Ann. § 48-39-180 (1994), alleging that the OCRM's permit denials imposed a "taking without compensation." R. 33–34; S.C. Code Ann. § 48-39-180 (1994). The court referred the case to a Master-in-Equity,[5] Pet. App. 42a, who ruled that, under *Lucas*, McQueen had suffered "a taking of private property under the Fifth Amendment of the United States Constitution." *Id.* Based on McQueen's testimony that he had received offers of $50,000 per lot, *id.* at 52a, 53a, the master ordered the OCRM to pay McQueen $100,000 compensation. *Id.* at 53a.

3. The South Carolina Court of Appeals affirmed the master's ruling that the OCRM's permit denials imposed a categorical taking. *Id.* at 35a. Indeed, the court held that because the OCRM's permit denials left McQueen's property with no economically beneficial use, "McQueen has suffered *a textbook taking*." *Id.* at 34a (emphasis added). Because the court found that McQueen's testimony was insufficient by itself to support the compensation award, however, the court remanded to determine the amount of compensation. *Id.*

4. On appeal, the Supreme Court of South Carolina reversed solely because McQueen "failed to demonstrate the distinct investment-backed expectations required to find a taking." *Id.* at 21a. The court found it "*uncontested* [that] the permit denial at issue here deprives respondent of all economically viable use of his property." *Id.* at 12a

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[5] South Carolina procedures authorize the Court of Common Pleas to refer a case to a master "where the parties consent." S.C. R. Civ. P. 53(b) (1993). Unless the order of reference contains specific limitations on his authority, "the master has and shall exercise the power and authority of the court sitting without a jury." *Id.* at 53(c).

(emphasis added). The court also rejected the OCRM's attempt to identify a background principle of law as a defense to McQueen's claim. In the court's view, the OCRM's asserted principle—"'[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others,'" *id.* at 14a (quoting *Carter* v. *South Carolina Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984), *in turn quoting Just* v. *Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972))—was overruled by *Lucas*. *Id.* at 16a. The court also declined to address other background principles of law asserted by *amici curiae*, including the public trust doctrine, "[b]ecause these arguments were not made to the lower courts, and because we reverse on other grounds." *Id.* at 13a n.2. Notwithstanding McQueen's total loss and the state's failure to identify a valid background principle of law, the court denied McQueen's claim solely based on his alleged "lack of investment-backed expectations." *Id.* at 21a.

5. McQueen filed a petition for certiorari with this Court, which issued a GVR order directing the state court to reconsider its ruling in light of *Palazzolo*. *Id.* at 8a. Instead of complying, the Supreme Court of South Carolina ordered the parties to brief three questions unrelated to this Court's holding in *Palazzolo*. *Id.* at 63a. McQueen filed a Motion to Amend asking the court to include the question of whether the court's initial judgment could withstand the reasoning and holding of *Palazzolo*. *Id.* at 60a. McQueen pointed out that "the Supreme Court's mandate . . . calls on this Court to determine what effect *Palazzolo* had on its prior decision in this case." *Id.* at 61a. The OCRM agreed that this question needed to be addressed. *Id.* at 58a. However, the South Carolina court denied the motion, vacated its first briefing order, and directed the parties to brief three revised questions that still failed to address the question involving *Palazzolo*: "I. Did the Court of Appeals err in

finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?" "II. If not, do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?" "III. If not, may a court use investment-backed expectations to determine McQueen's damages?" *Id.* at 55a–56a.

6. On remand, the Supreme Court of South Carolina unanimously denied McQueen's takings claim. *Id.* at 7a. The court again found it "*uncontested* that McQueen's lots retain no value and therefore a *total taking* has occurred." *Id.* at 4a (emphasis added). While acknowledging that this Court's remand was based on *Palazzolo*, *id.* at 3a, the South Carolina court reduced to a footnote its substantive discussion of the relationship between *Palazzolo* and the vacated judgment. *Id.* at 4a n.5. The court opined that *Palazzolo* does not resolve whether a categorical takings claim under *Lucas* requires proof of an owner's reasonable investment-backed expectations. *Id.* But the court backed away from deciding this question, "[i]n light of [its] disposition on the threshold issue of background principles of state law . . . ." *Id.*

The court then turned to the public trust doctrine, which it adopted as the ground of decision in this case for the first time on remand. The court framed the doctrine in these terms: "The State has the exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a (citations omitted). Based on its inference that "[t]he tidelands included on McQueen's lots are public trust property subject to control of the State," the court reasoned that "McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he

cannot otherwise do." *Id.* at 7a. Accordingly, the court held, "no compensation is due." *Id.*

REASONS FOR GRANTING THE WRIT

"[T]he Fifth Amendment's Property Clause [is] more than a pleading requirement, and compliance with it [is] more than an exercise in cleverness and imagination." *Nolian* v. *Cal. Coastal Comm'n*, 483 U.S. 825, 841 (1987). The Supreme Court of South Carolina has demonstrated more cleverness than compliance, however, by disregarding this Court's order to reconsider the case in light of *Palazzolo* and by invoking a new and expansive conception of the public trust doctrine to disguise its unwillingness to compensate even an admitted "total taking." Pet. App. 4a. For these and other reasons, fully set out below, the petition should be granted.

I. THE SUPREME COURT OF SOUTH CAROLINA DISREGARDED THIS COURT'S MANDATE TO RECONSIDER THE CASE IN LIGHT OF *PALAZZOLO* v. *RHODE ISLAND*.

This Court issued a GVR order directing the Supreme Court of South Carolina to conduct proceedings "for further consideration in light of *Palazzolo* v. *Rhode Island* . . . ." *Id.* at 8a. That order obligated the South Carolina court to consider how *Palazzolo* might affect its prior judgment. *See, e.g.*, *United States* v. *M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) (holding that a GVR "merely required the court to reconsider its opinion in *M.C.C. I* in light of the law set forth in *Tull*."); *Hughes Aircraft Co.* v. *United States*, 140 F.3d 1470, 1474 (Fed. Cir. 1998) (holding that "the scope of our review on remand is limited to determining whether *Hughes VII* satisfies the legal analysis required by *Warner-Jenkinson*"); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So.2d 1339, 1341 (Ala. 1988) (stating that by the GVR mandate the court is "required to review the issues in the instant litigation in light of the principles enunciated in *Lavoie*").

Such a remand order assuredly did "not . . . nullify all prior proceedings." *Id.*; *see also Robinson* v. *Ariyoshi*, 854 F.2d 1189, 1190 (9th Cir. 1988) (rejecting the contention that "the Supreme Court's decision to remand the case on one narrow question reopens the whole case for reconsideration of all issues that have arguably been changed by state law in the interim."). Treating a case on remand from a GVR as a blank slate not only exceeds the narrow scope of the mandate, it deprives the party that obtained the remand of its "rightful sense of repose and frustrate[s] the judicial system's core principles of finality and efficiency." *Kotler* v. *Am. Tobacco Co.*, 981 F.2d 7, 13–14 (1st Cir. 1992).

Nevertheless, the Supreme Court of South Carolina responded to this Court's mandate by devising three unrelated questions of its own and ordering the parties to brief them. Pet. App. 63a. The order omitted any reference to the effect of *Palazzolo* on the court's prior judgment. *Id.* Worse yet, the court denied McQueen's motion to amend the briefing order to include that question, even though the parties substantially agreed on the need to do so. *Id.* at 55a. By denying McQueen's motion to amend the briefing order, the court effectively announced its intention to use the remand to "reopen[ ] the whole case for reconsideration on all issues . . . ." *Robinson*, 854 F.2d at 1190.

Indeed, of the three questions posed by the court, two reopened matters—whether McQueen had been deprived of "all economically valuable use" of his property and whether the OCRM could identify a valid background principle of law—on which McQueen had prevailed in the initial decision. *Compare* Pet. App. 55a–56a *with id.* at 12a, 16a. Apart from the unfairness of compelling McQueen to wage a new battle for ground he had already won, this mode of proceeding manifested the South Carolina court's determination to avoid deciding the question on which the remand was based.

The opinion below amply confirms this understanding. While paying lip service to *Palazzolo*, the court relegated to a footnote its substantive discussion of the relationship between *Palazzolo* and the court's vacated judgment. *Id.* at 4a n.5. Moreover, the court firmly refused to apply *Palazzolo* to the decisive question of background principles of law in spite of the important guidance that decision contains. *See infra* at 16.

These facts securely establish that the Supreme Court of South Carolina disregarded this Court's mandate. The South Carolina court did not merely stumble in responding to the GVR, as the denial of McQueen's motion demonstrates. The court did not neglect *Palazzolo* for some extraneous reason like the passage of new legislation or a factual development in the case. Nor did the court travel beyond the narrow confines of its mandate after determining that considering its earlier judgment in light of *Palazzolo* required it to resolve an antecedent or subsidiary question. Disregard for this Court's mandate is the only available explanation for the South Carolina Supreme Court's failure to limit its review to the effect of *Palazzolo* on its earlier judgment.

Such waywardness threatens the integrity of the GVR order as an "integral part of this Court's practice." *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam). Not surprisingly, then, this Court has granted review to correct a lower court's failure to obey a GVR. *See Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam) (granting certiorari and reversing a decision of the Supreme Court of South Carolina for failing to apply the decision on which the GVR was based); *Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (granting certiorari out of a concern that "the South Carolina Supreme Court had

not fully complied with our mandate" in the GVR order).[6] *Henry* and *Aiken* establish that a GVR is as binding on state courts as any other mandate. Certiorari is merited in this case because the Supreme Court of South Carolina defied this Court's mandate.

Moreover, the lower court's defiance laid the foundation for its decision on the merits. By directing the parties to brief the question of background principles of law, the South Carolina court in effect invited the OCRM to reargue a conception of the public trust doctrine that the court had previously rejected because it had been advanced only by an *amicus curiae*. Pet. App. 13a n.2. Not surprisingly, the court executed a perfect 180° turn by invoking the same principle to support its second denial of compensation. *Id.* at 5a–7a. However, the South Carolina court's conception of the public trust doctrine is irreconcilable with this Court's decisions in *Lucas* and *Palazzolo*, which emphasize the objective constraints placed on the definition of a relevant background principle of law.

II. THE SOUTH CAROLINA SUPREME COURT'S DENIAL OF COMPENSATION BASED ON A NOVEL AND EXPANSIVE CONCEPTION OF THE PUBLIC TRUST DOCTRINE CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *LUCAS* AND *PALAZZOLO*.

The Supreme Court of South Carolina denied compensation for a "total taking" based on a purported

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[6] In *Henry* and *Aiken* the Court remedied the lower court's failure to comply with a GVR by resolving the question contained in the remand order. *See Henry*, 376 U.S. at 777; *Aiken*, 484 U.S. at 215. In this case, however, the Court should grant review on the public trust doctrine question, because the South Carolina Supreme Court did not merely ignore the GVR order, it dramatically altered its ground of decision and issued a broad ruling under the Fifth Amendment.

background principle of law that the court adopted for the first time on remand. Not only the circumstances of this holding, but its substance, bring it into sharp conflict with this Court's decisions under the Fifth Amendment. Because it disregards the limits placed by this Court on the definition of a relevant background principle of law, the decision below threatens to nullify the categorical rule of *Lucas* by allowing courts to deny compensation for a confiscatory regulation by simply redefining the owner's property rights. Such an unmistakable conflict with this Court's constitutional decisions calls for review.

More than a decade ago this Court reversed another regulatory takings decision of the Supreme Court of South Carolina in *Lucas* and applied the rule that controls this case: "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019.

Despite the compelling simplicity of the categorical rule—"total regulatory takings must be compensated," *id.* at 1026—the South Carolina Supreme Court has refused to apply it in this case. Such resistance does not stem from any doubt that McQueen has suffered a complete loss. The court has twice found the fact of confiscation to be "uncontested." Pet. App. 4a, 12a.[7] Yet the court

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[7] In its initial (now vacated) decision the court held, "It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property." Pet. App. 12a. The decision below similarly held that "we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred." *Id.* at 4a. Whether stated in terms of use or value, the South Carolina Supreme Court has unambiguously and repeatedly found that McQueen's loss is complete. He is therefore entitled to invoke the categorical rule of *Lucas*.

managed to deny the force of the rule and concluded that "no compensation is due." *Id.* at 7a, 21a.

This time[8] the court's explanation for denying compensation rests on a novel and expansive conception of the public trust doctrine: "The State has the exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access." *Id.* at 6a (citations omitted). With no other support, the court inferred that because McQueen's land is statutorily deemed to be tidelands—certain forms of saltwater-tolerant grass thrive on his property—"the State need not compensate [McQueen] for the denial of permits to do what he cannot otherwise do." *Id.* at 7a.

This staggeringly broad conception of the public trust doctrine cannot be a valid defense to McQueen's confiscatory takings claim. It is true that South Carolina may avoid compensation, even for a confiscatory regulation, if supported by "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. However, *Lucas* explained that, while lower courts enjoy "some leeway" in identifying "*relevant* background principles," that flexibility has limits. *Id.* at 1032 n.18, 1030 (emphasis added).

In particular, *Lucas* "stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."

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[8] In its first decision, the court justified its denial of compensation based not on a background principle of law, but on McQueen's alleged failure "to demonstrate the distinct investment-backed expectations required to find a taking." Pet. App. 21a.

Id. at 1032 n.18. *Palazzolo* echoed this view, stating that "[t]he determination whether an existing general law can limit all economic use of property must turn on *objective factors*, such as the nature of the land use proscribed." 533 U.S. at 630 (citing *Lucas*, 505 U.S. at 1030) (emphasis added).[9]

Naturally, then, the Court specified those "objective factors" that should be analyzed in conducting the "'total taking' inquiry." *Id.*; 505 U.S. at 1030. These include (1) "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities"; (2) "the social value of the claimant's activities and their suitability to the locality in question"; (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike"; (4) whether "a particular use has long been engaged in by similarly situated owners . . . (though changed circumstances or new knowledge may make what was previously permissible no longer so)"; and (5) whether "other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Id.* at 1030–31 (citing Restatement (Second) of Torts §§ 826, 827, 828(a) and (b), 831, 827(e), 828(c), 830, 827 cmt. g (1979)).

Nor do these factors comprise the Court's only guidance. A relevant background principle of law "cannot be newly legislated or decreed (without compensation)." *Id.* at 1029. And it cannot be a "conclusory assertion" based on "a common-law maxim such as *sic utere tuo ut*

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[9] *Palazzolo* further underscored the objective nature of the background principles of law inquiry: "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title." *Palazzolo*, 533 U.S. at 629–30. As the Court explained, "[t]his relative standard would be incompatible with our description of the concept in *Lucas* . . . ." *Id.* at 630.

alienum non laedas," *id.* at 1031, or a "blanket rule that purchasers with notice have no compensation right when a claim becomes ripe." *Palazzolo*, 533 U.S. at 628. Such glib defenses forge "too blunt an instrument to accord with the duty to compensate for what is taken." *Id.*

A relevant background principle of law "must inhere in the title itself," thereby reflecting "the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." *Lucas*, 505 U.S. at 1029, 1027.[10] In sum, the kind of principle that can justify the uncompensated confiscation of private property must express one of "those common, shared understandings of permissible limitations derived from a State's legal tradition." *Palazzolo*, 533 U.S. at 630. The Court added this caution: "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Lucas*, 505 U.S. at 1031 (citation omitted).

None of these principles was mentioned, much less applied, by the South Carolina Supreme Court. The decision below leaps from a cursory explanation of the holding of *Palazzolo* to a discussion of the public trust doctrine as a principle of state law. Pet. App. 5a. Curiously, the decision omits any reference to *Palazzolo's* discussion of background principles of law despite the court's acknowledgement that *Palazzolo* was meant to guide the remand. *Id.* at 3a. Indeed, the court admitted no limit to the principles that could be invoked to defend

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[10] When McQueen bought his land, South Carolina law supported the right of a landowner—even of tidelands—to protect land from erosion. *See Lane* v. *McEachern*, 162 S.E.2d 174, 176 (S.C. 1968) (holding that the private owner of tidelands has the right to maintain artificial banks enclosing the land).

the OCRM's refusal to compensate McQueen. Having discovered a malleable principle of law in the public trust doctrine, the South Carolina court evidently decided to look no further.

The decision below thus threatens to nullify the categorical rule of *Lucas*. If the South Carolina Supreme Court is free to disregard objective constraints on the inquiry into background principles of law, other courts can be expected to follow suit. In that event, the categorical rule would pose no meaningful or durable barrier to the uncompensated confiscation of private property, because in asking a state court to determine whether state law supplies a defense to a regulatory taking, "the State's self-interest is at stake." *United States Trust Co. of N.Y.* v. *New Jersey*, 431 U.S. 1, 26 (1977). Owners seeking compensation would be left to the tender mercies of courts with the common law power to refashion property law by extinguishing even a fee simple estate. Through this convenient method, a court could deny compensation for the most unmistakable loss, just as the South Carolina court has done here. The conflict between the decision below and this Court's regulatory takings decisions could not be sharper.

In addition, the Supreme Court of South Carolina simply erred. Properly applied, the constraints set forth in *Lucas* and *Palazzolo* would have prevented the Court from denying McQueen's claim based on the public trust doctrine. Far from reflecting "an *objectively reasonable application*" of South Carolina law,[11] 505 U.S. at 1032

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[11] An "*objectively reasonable application*" of South Carolina law would have precluded the OCRM from asserting the public trust doctrine on remand. *Lucas*, 505 U.S. at 1031 n.18. South Carolina law contains a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C.* v. *Town of Mt. Pleasant*,

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n.18, the court's conception of the public trust doctrine was unprecedented in scope and in its application as a defense to a federal takings claim.

The South Carolina Supreme Court's conception of the public trust doctrine was adopted by the court for the first time on remand. *Compare* Pet. App. 5a–7a *with id.* at 13a n.2. Moreover, its application as a defense to a categorical taking appears to be entirely new under South Carolina law. *Compare id.* at 5a–7a *with Lucas* v. *South Carolina Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (stating that the court could not identify "any common law basis . . . by which it could restrain Lucas's desired use of his land . . . ."). And this broad conception of the public trust doctrine appears to have shallow historical roots, even outside the takings context. *See Lane*, 162 S.E.2d at 176 (holding that the private owner of tidelands has the right to maintain artificial banks enclosing the land). In particular, the decision below makes no effort to reconcile the imposition of confiscatory restrictions on all land below the high water mark with the importance

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526 S.E.2d 716, 724 (S.C. 2000). Consistently and strictly applied, *see, e.g., Smith* v. *Phillips*, 458 S.E.2d 427, 429 (S.C. 1995), the South Carolina Supreme Court has applied this rule against a landowner in a regulatory takings case. *Grant* v. *South Carolina Coastal Council*, 461 S.E.2d 388, 392 (S.C. 1995). Yet the court did not evenhandedly apply the rule to the OCRM, as required when adjudicating a federal claim. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). Instead, the court issued an open-ended invitation to identify "background principles within South Carolina property or nuisance law [that] absolve the State from compensating McQueen." Pet. App. 55a. Even worse, the court posed this question despite its prior decision not to reach the public trust doctrine, in part, "[b]ecause these arguments were not made to the lower courts." *Id.* at 13a n.2. The court thus reached the question of the public trust doctrine only by giving the state a free pass regarding a procedural rule that the court has strictly enforced in other cases. Far from reflecting an objective understanding of state law, the decision below bespeaks the exercise of raw judicial power.

historically placed on the private ownership of tidal wetlands in South Carolina:

> Historically in this State from its beginnings in 1670, tidelands, as opposed to submerged lands, were treated by Lords Proprietors, the Crown and the State of South Carolina as vacant lands subject to grant and private ownership as any other vacant lands, for at least 200 years, until the adoption of certain limitations following the discovery of phosphate beds. Indeed, it is an historical fact that *the economic welfare of the State throughout much of its history was largely dependent upon the cultivation of rice lands which were lawfully granted, privately owned tidelands.*

State v. *Hardee*, 193 S.E.2d 497, 504 (S.C. 1972) (Bussey, J., concurring in result) (emphasis added).

Any principle of law so directly at odds with a state's legal tradition cannot be a relevant background principle of law under *Lucas* and *Palazzolo*.[12] The South Carolina

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[12] Of course, the South Carolina Supreme Court's decision is inconsistent not only with *Lucas* and *Palazzolo*, but with a long line of decisions holding that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R.I. & P. R. Co.* v. *United States*, 284 U.S. 80, 96 (1931); *accord United States* v. *Causby*, 328 U.S. 256, 261 (1946); *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 138 n.36 (1978); *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980); *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984). By denying compensation based only on the level of the tide, the decision below is also inconsistent with *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), which held that the federal navigational servitude does not "create[ ] a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation." *Id.* at 172–73). More generally, forcing McQueen to sacrifice the right to use his land, for the good of "all the people of the State," S.C. Code Ann. § 48-39-30(A) (1994), is inconsistent with the Fifth Amendment's aim "to bar Government from forcing some people alone to bear public burdens

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Supreme Court's decision plainly reflects an effort to avoid the constitutional duty to pay compensation rather than "an *objectively reasonable application* of relevant precedents." *Lucas*, 505 U.S. at 1032 n.18.

III. USE OF THE PUBLIC TRUST DOCTRINE AS A DEFENSE TO A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING ISSUE OF CONSTITUTIONAL LAW.

The question presented is undoubtedly an important question of federal constitutional law. It challenges the Supreme Court of South Carolina's conclusion that an expansive version of the public trust doctrine qualifies as a background principle of law under *Lucas*. A background principle of law forms the government's single potential defense to a confiscatory takings claim. *Lucas*, 505 U.S. at 1032 n.18. As such, the question presented is a question of federal law rooted in the Fifth Amendment. *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.") (citations omitted).

Although "the law of real property is, under our Constitution, left to the individual States to develop and administer," *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), it would be a mistake to view the public trust doctrine in this context as a matter for state courts to administer without federal oversight. The Takings Clause precludes a state from denying compensation (at least for a confiscatory regulation) on the specious ground that the property right no longer exists. *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 167 (1998); *Loretto* v. *Teleprompter Manhattan CATV*

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which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

Corp., 458 U.S. 419, 439 (1982). Accordingly, members of the Court have noted that the background principles of law defense presents a federal question that may require scrutiny of decisions nominally rendered under state law. *Bush* v. *Gore*, 531 U.S. 98, 115 n.1 (2000) (Rehnquist, C.J., concurring); *Stevens* v. *City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting from the denial of certiorari).[13]

The decision below is also important because of its broad practical effects. The U.S. Fish & Wildlife Service has reported that "[t]he 4,104,850 acres . . . of wetlands in South Carolina make up approximately 21 percent of the land surface area of the State." T.E. Dahl, U.S. Fish & Wildlife Service, South Carolina's Wetlands: Status and Trends, 1982–1989, at 36 (1999). In addition, the Service estimates that "[o]ver 91.0 percent of South Carolina's wetland acreage is in private ownership." *Id.* at 35.

Based on the Service's figures, approximately 374,234 acres[14] of South Carolina wetlands fit the description of McQueen's land. The South Carolina Supreme Court's conception of the public trust doctrine—"[t]he State has the exclusive right to control land *below the high water mark* for the public benefit," Pet. App. 6a (citations

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[13] This need to police the application of *Lucas* follows from the familiar principle that the Court, in its exercise of judicial review, must sometimes probe state law to determine whether a federal right has been denied contrary to federal law. *See, e.g., Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623–26 (1813) (examining Virginia legislation to determine whether it escheated private property in violation of the federal Treaty of 1794); *Trustees of Dartmouth College* v. *Woodworth*, 17 U.S. (4 Wheat.) 518, 650–54 (1819) (construing New Hampshire statutes to determine whether they denied a college's rights under the Contracts Clause).

[14] This estimate is the product of the amount of estuarine emergent wetlands (411,246 acres) and the percentage of wetlands held in private hands (91%). Dahl, at 35, 36.

omitted) (emphasis added)—thus implicates hundreds of thousands of acres of private property. With the "exclusive right to control" this land, the South Carolina Supreme Court has asserted the state's power to (1) prohibit "activity that substantially impairs the public interest in marine life, water quality, or public access" and (2) deny a constitutional claim for compensation even when that prohibition rises to the level of total confiscation. *Id.* at 6a, 7a. A decision with such vast practical effects deserves review.

Review also should be granted because the question presented is a recurring issue of national importance that only this Court can finally resolve. The extent to which the public trust doctrine supplies a valid defense to a regulatory takings claim is a recurring issue in both federal and state courts.[15] This question can be expected to recur, if only because regulatory takings cases are "among the most litigated and perplexing in current law." *Eastern Enterp.* v. *Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

IV. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTION PRESENTED.

Several reasons favor granting review in this case rather than awaiting another vehicle to resolve the question presented. Jurisdiction lies with the Court and McQueen has standing to bring this action. The decision below represents a final judgment that rests on a single ground of decision under federal constitutional law. *See*

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[15] *See, e.g., Esplanade Properties, LLC* v. *City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002), *cert. denied* 123 S. Ct. 2574 (2003); *Tulare Lake Basin Water Storage Dist.* v. *United States*, 49 Fed. Cl. 313, 321–22 (Fed. Cl. 2001); *Orion Corp.* v. *State*, 747 P.2d 1062, 1082–83 (Wash. 1987); *R.W. Docks & Slips* v. *State*, 628 N.W.2d 781, 787–89 (Wis. 2001).

Pet. App. 7a. No further proceedings will be held in the South Carolina courts in this case unless this Court intervenes. A decision on the merits for McQueen therefore offers his only avenue of relief.

No relevant factual disputes divide the parties at this stage of the proceedings. The crucial fact of total confiscation is "uncontested." *Id.* at 4a (footnote omitted). There is no dispute that saltwater tolerant plants grow on McQueen's lots. If the South Carolina Supreme Court's conception of the public trust doctrine is a relevant background principle of law, the breadth of that principle embraces McQueen's land. Absent relevant factual disputes, this case presents a pure question of federal law that this Court can readily resolve.

Moreover, this case labors under none of the technical disputes typical of regulatory takings cases. McQueen's claim is ripe. Given the OCRM's final order denying McQueen's permit applications, R. 17, "there [is] no question here about how the 'regulations at issue [apply] to the particular land in question.'" *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 191 (1985)). No denominator problem, *see Lucas*, 505 U.S. at 1016 n.7, lurks in the distance. The Master-in-Equity ruled that the OCRM's permit denials affect 100% of each of McQueen's lots. Pet. App. 52a, 53a.

Finally, the decision below was no aberration. The South Carolina Supreme Court has an unfortunate history of denying regulatory takings claims based on various "blanket exception[s] to the Takings Clause," *Kaiser Aetna*, 444 U.S. at 172.[16] Indeed, on no fewer than

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[16] *See, e.g.*, Pet. App. 21a (denying a takings claim under *Lucas* because the owner allegedly lacked reasonable investment backed expectations); *Wooten* v. *South Carolina Coastal Council*, 510 S.E.2d

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10 occasions since the decision on remand from this Court in *Lucas* (including the decision below), the South Carolina Supreme Court has decided claims under *Lucas*—every one of which the court denied, even if doing so required the reversal of lower court decisions in the owner's favor.[17] This unbroken pattern of decisions in favor of the state, together with a specific disregard for the Court's mandate in this case, suggests that nothing short of plenary review and direct reversal will insure South Carolina's adherence to this Court's regulatory takings decisions.[18]

(...continued)

716, 718 (S.C. 1999) (denying a takings claim under *Lucas* because the owner acquired title after enactment of the regulation); *Rick's Amusement, Inc.* v. *State*, 570 S.E.2d 155, 159 (S.C. 2001) (denying a takings claim under *Lucas* because the property interest in video gambling machines occurs in a highly regulated industry).

[17] Pet. App. 9a, 21a (reversing a South Carolina Court of Appeals holding that the owner had suffered a categorical taking under *Lucas*); *Sea Cabins on the Ocean IV Homeowners Ass'n* v. *City of North Myrtle Beach*, 548 S.E.2d 595, 604 (S.C. 2001) (reversing a Circuit Court holding that the owner had suffered a categorical taking); *Wooten*, 510 S.E.2d at 718 (same); *Rick's Amusement, Inc.*, 570 S.E.2d at 159 (denying a takings claim under *Lucas*); *Main* v. *Thomason*, 535 S.E.2d 918, 924 (S.C. 2000) (same); *Westside Quik Shop, Inc.* v. *Stewart*, 534 S.E.2d 270, 274 (S.C. 2000) (same); *Quality Towing, Inc.* v. *City of Myrtle Beach*, 530 S.E.2d 369, 373 (S.C. 2000) (same); *Grant* v. *South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (same); *Long Cove Club Assocs., L.P.* v. *Town of Hilton Head Island*, 458 S.E.2d 757, 758 (S.C. 1995) (same).

[18] South Carolina is not alone in its resistance to the *Lucas* decision. *See, e.g.*, *Cooley* v. *United States*, 324 F.3d 1297, 1304–05 (Fed. Cir. 2003) (declining to apply *Lucas* even when a trial court found that the denial of a wetlands fill permit extinguished 98.8% of the owner's property value); *Landgate* v. *Cal. Coastal Comm'n*, 953 P.2d 1188, 1212 (Cal. 1998) (Brown, J., dissenting) (stating with regard to the denial of a *Lucas* claim that "[i]n these limited circumstances, government must turn square corners—except in California"); *Stevens* v. *City of Cannon Beach*, 854 P.2d 449, 460 (Or. 1993) (holding

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CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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JULY 28, 2003

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that the doctrine of custom applies to all dry sand areas along Oregon's coastline and qualifies as a background principle of law justifying the denial of a *Lucas* claim); *Wilson* v. *Commonwealth*, 597 N.E.2d 43, 46 (Mass. 1992) (expressing doubt whether *Lucas* applied to the takings claim of owners whose property the court admitted to be worthless).

APPENDIX A

Supreme Court of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and

Environmental Control, Office of Ocean and Coastal Resource Management,

Petitioner.

No. 25642.

Heard March 18, 2003.

Decided April 28, 2003.

Justice MOORE:

This regulatory takings case is before us on remand from the United States Supreme Court to reconsider our previous decision[1] in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

FACTS AND PROCEDURE

In the early 1960's, respondent McQueen purchased two non-contiguous lots located on manmade saltwater canals in the Cherry Grove section of North Myrtle Beach. He paid $2,500 in 1961 for a lot on 53rd Avenue and $1,700 in 1963 for a lot on 48th Avenue. Since then, both lots have remained unimproved. The lots surrounding McQueen's are improved and have bulkheads or retaining walls.

In 1991, McQueen filed applications with petitioner Office of Ocean and Coastal Resource Management

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[1] *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000).

(OCRM)[2] to build bulkheads on his lots. After an administrative delay, he reapplied in 1993 requesting permits to backfill his lots and build bulkheads. In January 1994, a hearing was held at which the following facts were put into evidence.

At the time of the hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by "continuous" erosion, although little change had occurred since the permits were originally sought in 1991. The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

The proposed backfill would permanently destroy the critical area environment on these lots. Without the backfill and bulkheads, the property does not have enough high ground to be developed. Eventually tidal water will reach the roads bordering these lots which will require bulkheads to protect the public roads.

In October 1994, a final decision[3] was issued denying both permits based on OCRM's evaluation of McQueen's lots as predominantly critical area wetlands.[4] McQueen then commenced this action seeking compensation for a regulatory taking. The master-in-equity found the denial

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[2] Formerly South Carolina Coastal Council.

[3] The Coastal Zone Management Appellate Panel upheld denial of the permits.

[4] S.C.Code Ann. § 48-39-130(C) (Supp.2002) provides that "no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the department." Under § 48-39-10(J), "critical area" includes tidelands. "Tidelands" means "all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved." § 48-39-10.

of the permits deprived McQueen of all economically beneficial use of the lots and awarded him $50,000 per lot as just compensation.

OCRM appealed. By a divided court, the Court of Appeals affirmed the finding of a taking because McQueen was deprived of all economically beneficial use of his property. The majority held: "The definitive issue is what rights McQueen possessed when he purchased the lots and ... the right to add a bulkhead and fill were McQueen's at the time of purchase." *McQueen v. South Carolina Coastal Council*, 329 S.C. 588, 595, 496 S.E.2d 643, 647 (Ct.App.1998). The Court of Appeals found the evidence insufficient, however, to support the amount of compensation awarded by the master and the case was remanded. OCRM then sought a writ of certiorari in this Court which was granted.

On review of the Court of Appeals' decision, we reversed. We found it was uncontested that McQueen was deprived of all economically beneficial use of his property but found he had no reasonable investment-backed expectations because of pre-existing wetlands regulations, therefore no taking had occurred. *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000). The United States Supreme Court then granted McQueen's petition for a writ of certiorari, summarily vacated our opinion, and remanded for further consideration in light of the recent Palazzolo decision.

Palazzolo involved a partial taking of property including wetlands. The Rhode Island Supreme Court found the landowner had not been deprived of all economically beneficial use of his property and, even if he had, the right to fill wetlands was not part of his ownership estate because regulations prohibiting such activity were enacted before he acquired title. *Palazzolo v. State*, 746 A.2d 707 (2000). On writ of certiorari, the United States Supreme Court reversed holding that pre-existing regulation was not dispositive in itself, either in

the context of determining ownership rights under background principles of state law or in determining the investment- backed expectation factor in a partial taking. *Palazzolo*, 533 U.S. at 626 & 629-30, 121 S.Ct. 2448.

ISSUE

Do background principles of South Carolina property law absolve the State from compensating McQueen?

DISCUSSION

First, we accept as uncontested that McQueen's lots retain no value and therefore a total taking has occurred.[5]

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[5] Our analysis differs depending on whether a taking is characterized as partial or total. When there has been a partial taking by government regulation, the court determines if compensation is due by applying a complex of factors referred to as the *Penn Central* factors: the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448. Where regulation compels the property owner to suffer a physical occupation or deprives the owner of all economically beneficial use of his property, however, with "certain qualifications," compensation is due. *Palazzolo*, 533 U.S. at 617, 121 S.Ct. 2448; *see also Sea Cabins on Ocean IV Homeowners' Assoc., Inc. v. City of North Myrtle Beach*, 345 S.C. 418, 548 S.E.2d 595 (2001). In these two instances, the owner must be compensated "without case-specific inquiry into the public interest advanced in support of the restraint," a factor in the *Penn Central* complex. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

Lucas left much confusion, however, about whether another *Penn Central* factor, "investment-backed expectations," survived in the context of a total deprivation case. *Compare Good v. United States*, 189 F.3d 1355 (Fed.Cir.1999) (this factor applies even in total deprivation case) *and Palm Beach Isles Assocs.*, 231 F.3d 1354 (Fed.Cir.2000) (*Lucas* eliminated this factor in total deprivation case), *petition for rehearing en banc denied* 231 F.3d 1365 (Gajarsa, J. dissenting); *see also Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 534 S.E.2d 270 (2000) (following *Good*). *Palazzolo* has not clearly resolved this issue. In light of our disposition on the threshold issue of

When there has been a total deprivation of all economically beneficial use, the threshold issue in determining whether compensation is due is whether the landholder's rights of ownership are "confined by limitations on the use of land which 'inhere in the title itself.' " *Palazzolo*, 533 U.S. at 629, 121 S.Ct. 2448 (*quoting Lucas*, 505 U.S. at 1029, 112 S.Ct. 2886); *see also Rick's Amusement, Inc. v. State*, 351 S.C. 352, 570 S.E.2d 155 (2001) *cert. denied* 535 U.S. 1053, 122 S.Ct. 1909, 152 L.Ed.2d 819 (2002) (threshold inquiry in regulatory taking is whether the property interest affected is inherent in the plaintiff's ownership rights). Background principles of State property and nuisance law inform this inquiry. *Palazzolo*, 533 U.S. at 629, 121 S.Ct. 2448. Where the proscribed use is not part of the owner's title to begin with, no compensatory taking has occurred. *Lucas*, 505 U.S. at 1027, 112 S.Ct. 2886.

Public Trust Doctrine

As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884); *see also State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 216 S.C. 500, 59 S.E.2d 132 (1950), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).[6]

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background principles of state law discussed below, we need not decide whether this factor applies to a total taking.

[6] The State's presumptive title may be overcome only by showing a specific grant from the sovereign which is strictly construed against

The State has the exclusive right to control land below the high water mark for the public benefit, *Port Royal Mining Co. v. Hagood*, 30 S.C. 519, 9 S.E. 686 (1889), and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access. *Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 456 S.E.2d 397 (1995); *see also Heyward v. Farmers' Min. Co.*, 42 S.C. 138, 19 S.E. 963 (1884) (public trust land cannot be placed entirely beyond direction and control of the State); *Cape Romain Land & Improvement Co. v. Georgia- Carolina Canning Co.*, 148 S.C. 428, 146 S.E. 434 (1928) (protected public purposes of trust include navigation and fishery). The State's presumptive title applies to tidelands. *State v. Yelsen Land Co.*, 265 S.C. 78, 216 S.E.2d 876 (1975).

Significantly, under South Carolina law, wetlands created by the encroachment of navigable tidal water belong to the State. *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 458 S.E.2d 547 (1995). Proof that land was highland at the time of grant and tidelands were subsequently created by the rising of tidal water cannot defeat the State's presumptive title to tidelands. *State v. Fain*, 273 S.C. 748, 259 S.E.2d 606 (1979).

As described above, each of McQueen's lots borders a man-made tidal canal.[7] At the time the permits were

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the grantee. *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 252 S.E.2d 133 (1979). *Cf. City of Folly Beach v. Atlantic House Props.*, Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995) (without considering public trust, compensation was ordered where it was uncontested plaintiff was "owner of record" of land below high water mark).

[7] While many of the cases cited above refer to land bordering "navigable tidal" water, under South Carolina law tidal water is presumed navigable unless shown incapable of navigation *in fact*, a showing not made here. *State v. Pacific Guano Co., supra.* The fact that a waterway is artificial is irrelevant since it is considered the functional equivalent of a natural waterway. *Hughes v. Nelson*, 303 S.C. 102, 399 S.E.2d 24 (1990).

denied,[8] the lots had reverted to tidelands with only irregular portions of highland remaining. This reversion to tidelands effected a restriction on McQueen's property rights inherent in the ownership of property bordering tidal water.

The tidelands included on McQueen's lots are public trust property subject to control of the State. McQueen's ownership rights do not include the right to backfill or place bulkheads on public trust land and the State need not compensate him for the denial of permits to do what he cannot otherwise do. *Accord Esplanade Props., Inc. v. City of Seattle*, 307 F.3d 978 (9th Cir.2002) (finding no taking where state public trust doctrine precludes dredging and filling tidelands). Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen's own lack of vigilance in protecting his property.

We find no compensation is due. After reconsideration in light of *Palazzolo*, we reach the same conclusion we originally reached in this case and reverse the Court of Appeals.

REVERSED.

TOAL, C.J., WALLER, BURNETT and PLEICONES, JJ., concur.

580 S.E.2d 116

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[8] The value of the interest in land is to be determined at the time of condemnation. City of Folly Beach v. Atlantic House Props., Ltd., 318 S.C. 450, 458 S.E.2d 426 (1995). Condemnation occurred when the permits were denied by a final decision. *See* Palazzolo, 533 U.S. at 618. Regulatory delay does not give rise to a compensatory taking. Sea Cabins, supra.

APPENDIX B

Supreme Court of the United States

Sam B. McQueen, petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT.

No. 00-285.

June 29, 2001

Case below, 340 S.C. 65, 530 S.E.2d 628.

On petition for writ of certiorari to the Supreme Court of South Carolina. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of South Carolina for further consideration in light of *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d. 592 (2001).

APPENDIX C

Supreme Court of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management,
Petitioner.

No. 25108.

Heard Feb. 3, 2000.

Decided April 17, 2000.

Rehearing Denied May 24, 2000.

BURNETT, Justice:

Petitioner South Carolina Coastal Council[1] appeals the decision of the Court of Appeals holding Coastal Council's denial of permits to bulkhead and fill lots owned by respondent constituted a taking requiring just compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct.App.1998). We reverse.

FACTS

Respondent purchased a lot on 53rd Avenue in the Cherry Grove section of North Myrtle Beach in 1961 for $2500, and a lot on 48th Avenue in 1963 for $1700. Each lot is valued at $22,800 for tax purposes. Both lots are

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management. We refer to the agency as the Coastal Council for the sake of consistency with the earlier proceedings in this case.

located on manmade, saltwater canals and were created by fill, as were all the lots in the area. Respondent's lots are unimproved, but most of his neighbors' lots have houses and bulkheads constructed on them.

In July 1991, respondent applied to the South Carolina Coastal Council for permits to build bulkheads on his lots to prevent further erosion of his own and his neighbors' property. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only, with the condition the bulkhead be constructed 75 feet from the street. Respondent sought a 90-foot setback to comply with the City of North Myrtle Beach's requirements to build on the property. Due to some confusion on the part of the Army Corps of Engineers, which participates in the permitting process, no action was taken on the 48th Avenue lot. The Coastal Council determined the only way to correct the confusion would be to resubmit both applications and begin the review process anew.

Respondent resubmitted the applications to the Coastal Council in 1993. Both permits were denied because the proposed bulkheads were located within the tidelands critical area, so that any backfill would result in filling of tidal wetlands, adversely affecting the environment.

Respondent appealed the denial of the permits, first to the Coastal Council, then to the Coastal Zone Management Appellate Panel. Both bodies upheld the denial of the permits. The Panel found the permits sought by respondent were prohibited by S.C.Code Ann.Regs. 30-12(G)(2)(a) (Supp.1998), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this purpose should be denied. The Panel further found denial of the permits did not constitute a taking because respondent had no distinct investment-backed expectations, as evidenced by his failure to take action to prevent the erosion of his property.

Respondent appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. The case was referred to the master-in-equity, who found that by denying respondent the permits, the Coastal Council deprived him of all economically beneficial use of his property, resulting in a taking. Based on respondent's testimony that he had been offered $50,000 for each of the lots, the master found respondent was entitled to $100,000 in compensation. The Coastal Council appealed. A divided Court of Appeals affirmed the master's ruling that respondent suffered a taking, but found insufficient evidence in the record to support the master's determination as to compensation. *McQueen v. South Carolina Coastal Council,* 329 S.C. 588, 496 S.E.2d 643 (Ct.App.1998). The court therefore remanded the issue of just compensation to the circuit court. We granted Coastal Council's petition for certiorari.

ISSUES

Did Coastal Council's permit denial constitute a "taking" of respondent's property?

A. Do background principles of state law bar respondent from filling his lots?

Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

DISCUSSION

The Fifth Amendment to the United States Constitution provides "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The government "takes" property for public use when it regulates the property in a manner

which denies the owner all economically beneficial use of his property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In order to recover on a regulatory takings claim, a property owner must establish:

> (1) there was a denial of economically viable use of the property as a result of the regulatory imposition;
> (2) the property owner had distinct investment-backed expectations; and
> (3) the interest taken was vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1179 (Fed.Cir.1994) (restating the law of regulatory takings as defined by cases up to and including *Lucas*). The Court of Appeals held respondent suffered a "textbook regulatory taking." *McQueen,* 329 S.C. at 600, 496 S.E.2d at 650. We disagree.

It is uncontested the permit denial at issue here deprives respondent of all economically viable use of his property. The questions before this Court are whether respondent had a vested right to backfill his property and whether respondent had investment-backed expectations of developing his property.

Coastal Council contends the Court of Appeals erred in finding the instant case bears "a remarkable similitude" to *Lucas.* David Lucas purchased two coastal tracts in 1986 for $975,000, with the intent to build single- family homes on them. In 1988, the General Assembly enacted the Beachfront Management Act, S.C.Code Ann. § 48-39-250 et. seq. (Supp.1998), which had the direct effect of barring Lucas from erecting any permanent habitable structures on his property. *Lucas,* 505 U.S. at 1006-07, 112 S.Ct. 2886. The United States Supreme Court held "[w]here the State seeks to sustain regulation that deprives land of all economically

beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027, 112 S.Ct. 2886.

In the instant case, respondent neglected his property for thirty years, allowed the land to revert to wetlands, and now expects the State of South Carolina to pay him the going rate for high ground--a twenty-fold return on his initial investment. We agree with Coastal Council that this case is distinguishable from *Lucas*.

A. Do background principles of state law bar respondent from filling his lots?

In addressing the third prong of the regulatory takings test, the Court of Appeals majority asked: What rights did respondent possess when he purchased the lots? *McQueen*, 329 S.C. at 599, 496 S.E.2d at 649. The majority assumed, with no citation to authority, "the right to add a bulkhead and fill were [respondent's] at the time of purchase." *Id.* We do not think this is a valid assumption.[2] Nevertheless, we affirm the Court of Appeals' ruling that *Carter v. South Carolina Coastal*

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[2] Amici Curiae have argued numerous background principles of state law which could conceivably bar a property owner from backfilling wetlands. Most significant among these is the public trust doctrine. In South Carolina, the state owns the property below the high water mark of a navigable stream; this property is part of the public trust. *Sierra Club v. Kiawah Resort Assoc.*, 318 S.C. 119, 456 S.E.2d 397 (1995), *State v. Hardee*, 259 S.C. 535, 193 S.E.2d 497 (1972), *State v. Pacific Guano Co.*, 22 S.C. 50 (1884). The corollary to this principle is the rule that "lands gradually encroached upon by water cease to belong to the former riparian or littoral owner." *Horry County v. Tilghman*, 283 S.C. 475, 478, 322 S.E.2d 831, 833 (Ct.App.1984) (citing *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855)). Because these arguments were not made to the lower courts, and because we reverse on other grounds, we decline to address the application of these principles to respondent.

Council, 281 S.C. 201, 314 S.E.2d 327 (1984) is not a background principle of state law that bars respondent from developing his land.

> Is *Carter v. South Carolina Coastal Council* a background principle of state property law?

Coastal Council asserts this case falls into the *Lucas* exception, *i.e.*, the proscribed use interests were not part of respondent's title to begin with. Coastal Council argues that *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984), survives *Lucas* and represents a "background principle[ ] of state nuisance and property law that prohibit[s] the uses [respondent] now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031, 112 S.Ct. 2886. We disagree.

In *Carter,* we held denial of a permit to fill 5.3 acres of wetlands was not a taking because "[a]n owner of land has no absolute and unlimited right to change the natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 205, 314 S.E.2d at 329. We concluded the permit denial there was a valid exercise of the State's police power to prevent public harm. *Id.* at 204-05, 314 S.E.2d at 329.

Carter followed the landmark decision of *Just v. Marinette County,* 56 Wis.2d 7, 201 N.W.2d 761 (1972). Commentators are divided on whether the principle stated in *Just* (there is no absolute right to change the natural character of land) is a background principle of state property law that can be used as a basis for denying wetlands takings claims after *Lucas. See, e.g.,* Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches, 19 Harv.Envtl.L.Rev. 1, 46 & n. 260 (1995) (*Just* is a background principle), Jan Goldman-

Carter, Protecting Wetlands and Reasonable Investment-Backed Expectations in the Wake of Lucas v. South Carolina Coastal Council, 28 Land & Water L.Rev. 425, 447 & n. 138. (1993) (same)[3]; *but see* Joseph L. Sax, Property Rights & the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 Stan.L.Rev. 1433, 1440 (1993) (arguing the *Lucas* Court " repudiat[ed] the conclusion of *Just* "), Richard Ausness, Regulatory Taking & Wetland Protection in the Post-Lucas Era, 30 Land & Water L.Rev. 349, 403-04 (1995) ("*Lucas* is inconsistent with the reasoning of *Just v. Marinette County* and other cases that concluded that property owners have no inherent right to change the "natural" character of their land.") (citing *Carter, inter alia*).

Thus, the question before us is whether the rule articulated in *Carter* is a background principle of state property law that survives *Lucas.*[4] Our opinion in the

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[3] Commentators asserting *Just* is a background principle of state law express the principle in terms of the public trust doctrine, although neither *Just* nor *Carter* uses that term. *See supra* n. 2.

[4] No other court of record has yet squarely addressed the question whether *Just* is a background principle of state law. One court suggested it is in dicta. *See City of Riviera Beach v. Shillingburg,* 659 So.2d 1174, 1183 (Fla.Dist.Ct.App.1995) (dismissing takings claim on ripeness grounds, but citing *Just* principle post-*Lucas*); *see also Zealy v. City of Waukesha,* 201 Wis. 2d 365, 548 N.W.2d 528, 534 (1996) (finding no taking on other grounds, and declining to reach issue of whether *Just* is a *Lucas* background principle, but specifically noting that "[n]othing in this opinion limits our holding in *Just* and cases following its rule"), *Good v. United States,* 39 Fed.Cl. 81, 98 & n. 30 (1997) *aff'd* 189 F.3d 1355 (1999) (noting status of *Just* line of cases as a background principle of state law is unclear). We also note that Justice Blackmun's dissent in *Lucas* cites *Just* for the proposition that the majority erred in finding a "clear and accepted 'historical compact' or 'understanding of our citizens' justifying the Court's new takings doctrine." 505 U.S. at 1059-60, 112 S.Ct. 2886 (Blackmun, J., dissenting). Blackmun's dissent suggests he believed the majority's reasoning was flawed in light of *Just* (and other sources), not that he

first *Lucas* decision suggests the fate of *Carter* on the takings issue is inextricably linked to the outcome of the *Lucas* case. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 388, 404 S.E.2d 895, 901 (1991) (*Lucas I*), *reversed,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) ("To adopt Lucas' argument would therefore be to overrule *Carter.*"). However, the dissent in *Lucas I* did not find *Carter* controlling, and would have found a taking without overruling *Carter. Id.* at n. 4 (Harwell, J. dissenting). Moreover, the issue in *Carter* (and in this case), was not before the Court in *Lucas* because David Lucas sought to build on high ground; there was therefore no question he had that right prior to enactment of the Beachfront Management Act. *See Lucas v. South Carolina Coastal Council,* 309 S.C. 424, 424 S.E.2d 484 (1992) (*Lucas II*) (no common law basis exists by which State could restrain Lucas' desired use of his land).

We conclude *Carter* was overruled in part by the United States Supreme Court's *Lucas* decision.[5] While not specifically addressing the holding of *Just,* the United States Supreme Court repudiated the reasoning of *Just* in *Lucas:*

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use--typically, as here, *by requiring land to be left substantially in its natural state* --carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Lucas, 505 U.S. at 1018, 112 S.Ct. 2886 (emphasis added).

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thought *Just* fell into the exception carved out by the majority for background principles of state law.

[5] This conclusion does not affect the validity of *Carter* on the issue of the substantial evidence standard of review. *See* 281 S.C. at 202-04, 314 S.E.2d at 328-29.

The *Lucas* decision made clear the State "must do more than proffer ... the conclusory assertion that [the uses respondent desires] violate a common-law maxim such as *sic utere tuo ut alienum non laedas.*"[6] *Lucas,* 505 U.S. at 1031, 112 S.Ct. 2886. Furthermore, the Supreme Court explicitly rejected the State's police power justification for denying compensation. *Id.* at 1026, 112 S.Ct. 2886. We agree with the Court of Appeals that the United States Supreme Court overruled *Carter* on the takings issue in *Lucas. McQueen,* 329 S.C. at 597, 496 S.E.2d at 648.

B. Did respondent have distinct investment-backed expectations entitling him to compensation?

Coastal Council argues the Court of Appeals erred in refusing to consider its factual argument that respondent knew his lots were eroding for some time and failed to take measures to protect his property. We agree. Coastal Council was not arguing to the Court of Appeals that respondent had a legal duty to prevent the erosion of his property. Rather, this factual argument was intended to distinguish the case at bar from *Lucas* and to demonstrate a lack of investment-backed expectations. The Court of Appeals erred in failing to address this second prong of the regulatory takings test.

In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171, 1179 (Fed.Cir.1994), *Mibbs v. South Carolina Dep't of Revenue,* 337 S.C. 601, 524 S.E.2d 626 (1999). Without the requirement of investment- backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without

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[6] "Use your own property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (6th ed.1990).

any real intent to develop.This issue was not discussed in *Lucas* as there was no question David Lucas had distinct investment-backed expectations. *See Loveladies Harbor,* 28 F.3d at 1178. Nor was the issue disputed in *Loveladies Harbor. Id.* at 1179. However, several recent decisions have found no taking based on the property owner's lack of investment-backed expectations.

The most recent and similar of these decisions is *Good v. United States,* 189 F.3d 1355 (Fed.Cir.1999). Good purchased wetlands property in the Florida Keys in 1973. In 1980, he hired a land planning and development firm to obtain the federal, state, and local permits required to develop the property. In March 1981, he submitted his first permit application to the Army Corps of Engineers. The Corps granted the permit in May 1983. Good then modified the permit in response to county environmental concerns. The Corps issued a modified permit in January 1984. The permits were good for five years. *Id.* at 1357.

Good was meanwhile pursuing the required state and local permits. In February 1983, the state issued a permit conditioned on Good obtaining county approval. In May 1983, Good applied for county approval. After some wrangling over the standard of review, the county granted approval in July 1984. *Id.*

Having obtained federal, state, and county permits, Good next had to obtain review by the Florida Department of Community Affairs, pursuant to the state's Environmental Land and Water Management Act, Fla.Stat.Ann. §§ 380.012 to 380.12 (West 1997). The statute provided for the Department of Community Affairs to review local land development orders in Areas of Critical State Concern. The Department could appeal objectionable orders to the Florida Land and Water Adjudicatory Commission. The Department appealed the county's approval and the Commission held the county had applied the wrong standard of review and ordered the county to re-review the project under a stricter standard.

Id. at 1358.

In the meantime, the county had adopted a new land use plan and new development regulations. Good's project would not have been allowed under the new regulations. Good sued the state alleging a taking. That suit was settled and the consent order provided for evaluation of Good's application under the old regulations. *Id.*

By this time, Good's federal permits had almost expired. The Corps denied Good's request for an extension, but did grant new permits in October 1988 allowing substantially the same development. In November, the county gave preliminary approval to Good's plan. Final approval was subject to fifteen conditions, including approval by the South Florida Water Management District. Good applied with the Water Management District and a few months later, received notification that its staff recommended denial of the application based on "the unmitigated loss of wetlands." Good withdrew his application with the Water Management District. *Id.*

In July 1990, Good submitted a new, scaled-down plan to the Corps. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species. The Corps was therefore required to consult with the Fish and Wildlife Service to make sure the requested permit would not jeopardize the marsh rabbit. The Fish and Wildlife Service concluded Good's project would not jeopardize the marsh rabbit, but nonetheless recommended denial of the permit based on the plan's overall environmental impact. *Id.* at 1368-69.

Subsequently, the silver rice rat was listed as an endangered species. In December 1991, the Fish and Wildlife Service issued a new recommendation that the Corps deny Good's 1990 application because the

development threatened both the Lower Keys marsh rabbit and the silver rice rat. The Corps denied Good's 1990 permit application in March 1994 and informed Good his 1988 permit had expired. *Id.* at 1369.

Good sued the federal government alleging a taking of property without just compensation. He argued the permit requirements of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), and the Clean Water Act, 33 U.S.C § 1344 (1994), were irrelevant to his reasonable expectations at the time he purchased the property because he obtained the federal dredge-and-fill permits required by those acts three times and was only denied a permit based on the Endangered Species Act, 16 U.S.C. § 1531 et seq. (1994), which did not exist when he bought his land. The court, while acknowledging the reasonableness of Good's argument, ultimately rejected it. It noted Good purchased the property with knowledge that it might be difficult to obtain approval for his project, then waited seven years, "watching as the applicable regulations got more stringent, before taking any steps to obtain the required approval." *Id.* at 1361-62. The court stated that "[w]hile [Good's] prolonged inaction does not bar his takings claim, it reduces his ability to fairly claim surprise when his permit application was denied." *Id.* at 1363. The court concluded Good "lacked the reasonable, investment-backed expectations that are necessary to establish that a government action effects a regulatory taking." *Id.*

While *Good* is distinguishable from the instant case in various respects, the principle it articulates applies with equal force here. Respondent purchased beachfront property that has been the subject of at least some developmental regulation for over a century. *See, e.g.*, The Rivers & Harbors Act of 1899, 33 U.S.C. § 403 (1994) (requiring a permit from the Army Corps of Engineers to develop wetlands). This pre-existing permit requirement is relevant to respondent's investment-backed

expectations. *Forest Properties, Inc. v. United States*, 39 Fed.Cl. 56, 75-76 (1997). His prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations.

CONCLUSION

The Court of Appeals affirmed the denial of respondent's permit applications because the land he seeks to fill is protected wetlands. The only question before this Court is whether the denial of those permits constitutes a taking of property without just compensation. Because respondent has failed to demonstrate the distinct investment-backed expectations required to find a taking, we **REVERSE**.

TOAL, A.C.J., MOORE, WALLER, JJ., and Acting Justice R. Markley Dennis, Jr., concur.

APPENDIX D

Court of Appeals of South Carolina.

Sam B. McQUEEN, Respondent,

v.

SOUTH CAROLINA COASTAL COUNCIL, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management,
Appellant.

No. 2779.

Heard Dec. 2, 1997.
Decided Jan. 12, 1998.

As Corrected February 12, 1998.
Rehearing Denied Mar. 19, 1998.

ANDERSON, Judge:

Sam B. McQueen applied to the South Carolina Coastal Council[1] for permits to bulkhead[2] and backfill two noncontiguous lots he owns in the Cherry Grove section of North Myrtle Beach. The Coastal Council denied the permits, and McQueen appealed to the circuit court. The matter was referred to the master-in-equity to enter a decision with finality. The master found a taking had occurred and ordered that McQueen be compensated $100,000. The Coastal Council appeals. We affirm in

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[1] The South Carolina Coastal Council is now known as the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management.

[2] A bulkhead is "a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline." S.C.Code Ann. § 48-39-270(1)(b) (Supp.1996).

part, reverse in part, and remand.

FACTUAL/PROCEDURAL BACKGROUND

In 1961, Sam McQueen bought a lot on 53rd Avenue in Cherry Grove. In 1963, he bought a second lot in Cherry Grove on 48th Avenue. Both lots are located on manmade, saltwater canals. The lots in these neighborhoods were created from fill. McQueen's lots are undeveloped and are surrounded by other lots which have bulkheads. Houses have been constructed on most of the surrounding lots.

In July 1991, McQueen applied to the South Carolina Coastal Council to erect bulkheads on both of his lots to prevent further erosion. In January 1992, the Coastal Council issued a permit for the 53rd Avenue lot only. Attached to the permit was a stipulation that the bulkhead be constructed 75 feet from the street. In response, McQueen sought a 90-foot setback so that he could build on the property. Although applications for both lots were submitted with filing fees for each attached, the public notice issued by the Army Corps of Engineers (which participated in the permitting process) concerned only the 53rd Avenue lot. As a result of this confusion, action was taken only on the 53rd Avenue lot.

In a letter dated April 2, 1993, the Coastal Council stated that its failure to act on the 48th Avenue lot was because the Army Corps of Engineers sent the Council a public notice which referred only to the 53rd Avenue lot. In its letter, the Council stated, "It would appear to us that the only way to correct this confusion would be to submit a new application to the Corps or have them contact the Corps and issue a corrected public notice. Once this is accomplished, we will start our review process again."

McQueen resubmitted his applications for each lot in June 1993. No other government agency with input into the matter opposed the application, and neighbors wrote

to the Coastal Council on McQueen's behalf because the erosion on his property, where there were no bulkheads, was creating erosion on their lots. The permit administrator advised McQueen in September 1993 that both permits were being denied because the proposed bulkheads were located within "the tidelands critical area, so that any backfill results in the filling of tidal wetlands." The administrator stated filling the areas would have "an adverse environmental impact" and would serve "no overriding public interest."

McQueen sought review of the staff decision by the Coastal Council. An evidentiary hearing was held on January 21, 1994 before a hearing officer appointed by the Council to make findings of fact and recommendations to the full Council. McQueen's main grounds for the appeal were that (1) erosion control was needed on the lots; (2) the lots were originally man-made, and the bulkheads and fill would only refill previously altered areas; (3) sedimentation is having adverse effects on the canals; (4) the Army Corps of Engineers had previously approved the plans; (5) when the property was originally purchased, no restrictions were in place; and (6) the denial totally devalued the lots and amounted to an unconstitutional taking. The hearing officer recommended that the denial of the 48th Avenue lot be upheld and that the 53rd Avenue denial be overturned, "subject to the issuance of a permit substantially in accordance with the 1992 permit."

The Coastal Council refused to follow the hearing officer's recommendations and denied both permits again. Upon further review, the Coastal Zone Management Appellate Panel upheld the denials of both permits. The Panel found that the permits sought by McQueen were prohibited by S.C.Code Ann.Regs. 30-12(G)(2)(a) (Supp.1996), which provides that the creation of residential lots for private gain is not justification for filling in wetlands and that permit applications for this

purpose should be denied. The Panel determined McQueen had failed to establish the denial of the permits amounted to a taking.

McQueen appealed the Panel's decision to the circuit court, arguing the permit denials constituted a taking without just compensation. Upon referral, the master-in-equity found that by denying McQueen the permits, the Coastal Council had deprived him of all economically beneficial use of the property, resulting in a taking. The master found McQueen was entitled to $50,000 in compensation for each lot, or a total of $100,000. The Coastal Council appeals.

STANDARD OF REVIEW

The circuit court may review a decision made by the Appellate Panel "de novo." S.C.Code Ann. § 48-39-180 (Supp.1996). However, "statutes undertaking to give the courts de novo review of orders of administrative bodies exercising non-judicial functions are generally construed as providing for only a limited review." *Guerard v. Whitner,* 276 S.C. 521, 522, 280 S.E.2d 539, 540 (1981) (quoting *Board of Bank Control v. Thomason,* 236 S.C. 158, 113 S.E.2d 544 (1960)). "[T]he substantial evidence standard ... is the proper standard for review of actions by the Coastal Council." *Id.* at 523-24, 280 S.E.2d at 540. This court need only find that, looking at the entire record, "evidence that 'would allow reasonable minds to reach the conclusion that the administrative agency reached.' " *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984)). The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence. *Id.*

ISSUES

I. Did the master err by basing his findings and conclusions of law on alleged irregularities committed by the Coastal Council?

II. Is there substantial evidence in the record to support the Council's decision to deny the permits?

III. Did the master err in finding that the Council's permit denials deprived McQueen of all economically beneficial use of his property, resulting in an unconstitutional taking without just compensation?

LAW/ANALYSIS

I. Delays in the Permitting Process

The Coastal Council first argues that the master erred by basing his findings and conclusions of law on alleged irregularities it found in the Coastal Council's permitting process. The Council objects to the findings because it believes they prejudice this appeal.

The master did indeed find, *inter alia,* that (1) "for some unexplained reason, the [Coastal Council] did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the [Coastal Council] recommended approval of the 48th Avenue permit"; (2) "as a result of lack of action, mishandling and confusion caused by the [Coastal Council], the [Council] instructed Mr. McQueen to resubmit his applications to correct the confusion"; and (3) the Coastal Council issued denial letters for both lots more than 90 days after the filing of the applications, "contrary to the mandatory [statutory] requirements ... to act upon applications within 90 days of the filing." The master noted the significance of the reapplication process was that two additional years of erosion had occurred.

The master concluded that, once the permits were denied, a taking had occurred entitling McQueen to compensation. In our view, any irregularities, sloppiness,

or undue delay on the part of the Coastal Council that the master did notice are irrelevant for purposes of this appeal as they do not affect the master's ultimate conclusion that a taking had occurred. *See McCall v. Finley,* 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987) ("[W]hatever doesn't make any difference, doesn't matter."); *Cox v. Cox,* 290 S.C. 245, 349 S.E.2d 92 (Ct.App.1986) (appellant has burden of showing alleged error was prejudicial).

II. Sufficiency of Evidence to Support Denial of Permits

Secondly, the Coastal Council seeks affirmance that the record supports the denial of the permits on the basis that the lots were wetlands and that erecting bulkheads and adding fill to the lots would have an adverse environmental impact. We agree. This Court need only find that, looking at the entire record, there is evidence which would allow reasonable minds to reach the conclusion that the administrative agency reached. *Grant,* 319 S.C. 348, 461 S.E.2d 388; *Carter,* 281 S.C. 201, 314 S.E.2d 327.

Here, there was evidence that the critical area[3] line on the 48th Avenue lot had moved inward, a decision based on salt-tolerant vegetation found growing on the lots, *e.g., borrichia frutescens* and *spartina alterniflora,* which are indicators of a critical area. According to the Coastal Council's biologist, critical areas provide food for the marine estuarine system, create a habitat for fish and shellfish, buffer high ground, and filter sediments and pollutants. Building bulkheads and adding fill to these lots would destroy the area permanently. The biologist

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[3] "Critical areas" include coastal waters, tidelands, beaches, and beach/dune systems. S.C.Code Ann. § 48-39-10(J) (Supp.1996). "Coastal wetlands" means "those areas periodically inundated by saline waters ... and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction." S.C.Code Ann. § 48-39-10(G) (Supp.1996).

also found the majority of the 53rd Avenue lot was in a critical area. He noted the lot was regularly inundated with tidal flow. The biologist testified the 53rd Avenue lot served as a fish and shellfish habitat, and that building a bulkhead would likewise have a detrimental effect. It is plain from the record that one could find the lots were in critical areas and that the permits should be denied as a result.

III. *Lucas v. South Carolina Coastal Council:* Taking Occurs Where Government Action Deprives Landowner of All Economically Beneficial Use of Land

Finally, the Coastal Council alleges the master erred in concluding that a taking had occurred and in ordering McQueen to be compensated. We disagree.

Under the Coastal Zone Management Act, it is the state's goal "[t]o promote economic and social improvement of the citizens of this State" while "protect[ing] the sensitive and fragile areas from inappropriate development and provid[ing] adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone." S.C.Code Ann. § 48-39-30(1) (Supp.1996). Although the state may pursue this goal zealously, such alacrity may not lead to the unreasonable exercise of the state's police power which results in an uncompensated taking. The United States Supreme Court recently espoused the rationale for this limit in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), wherein the Court stated:

> Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), it was generally thought that the Takings Clause reached only a "direct appropriation" of property, *Legal Tender Cases,* 12 Wall. 457, 551, 20 L.Ed. 287 (1870), or the functional equivalent of a "practical ouster of [the

owner's] possession," *Transportation Co. v. Chicago*, 99 U.S. 635, 642, 25 L.Ed. 336 (1878). See also *Gibson v. United States*, 166 U.S. 269, 275-276, 17 S.Ct. 578, 580, 41 L.Ed. 996 (1897). Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415, 43 S.Ct., at 160. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Id.*, at 415, 43 S.Ct., at 160. These considerations gave birth in that case to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Ibid.*

Nevertheless, our decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going "too far" for purposes of the Fifth Amendment. In 70-odd years of succeeding "regulatory takings" jurisprudence, we have generally eschewed any " 'set formula' " for determining how far is too far, preferring to "engag[e] in ... essentially ad hoc, factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978) (quoting *Goldblatt v. Hempstead*, 369 U.S. 590, 594, 82 S.Ct. 987, 990, 8 L.Ed.2d 130 (1962)). See Epstein, Takings: Descent and Resurrection, 1987 S.Ct.Rev. 1, 4. We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the

> property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation....
>
> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins v. City of Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106; see also *Nollan v. California Coastal Comm'n,* 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987); *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 495, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 295-296, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*" *Agins, supra,* 447 U.S., at 260, 100 S.Ct., at 2141 (citations omitted) (emphasis added).

Id., 505 U.S. at 1014-16, 112 S.Ct. at 2892-94.

Appellant argues *Lucas* is inapposite to this case and relies heavily on *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327, in its brief.[4] We would note, however, that the United States Supreme Court emasculated *Carter* with respect to takings in its

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[4] In *Carter,* the South Carolina Supreme Court upheld the Coastal Council's denial of a permit to fill in marshlands as a legitimate exercise of the state's police power rather than an unreasonable taking. The court stated that a landowner has no absolute right to change the "essential natural character" of the land in order to use the land for a purpose for which it was unsuited in its natural state and which injures the rights of others. *Id.* at 204, 314 S.E.2d at 329.

Lucas opinion. In dissonance to the position taken by the Coastal Council, we conclude the case at bar epitomizes a remarkable similitude to *Lucas.*

Like McQueen, Lucas was a coastal property owner. He purchased his land in 1986, two years before the passage of the Beachfront Management Act in 1988. The Act, which redrew setback lines, prohibited Lucas from building "any permanent structure (including a dwelling), save a small deck or walkway" on his property. *Lucas v. South Carolina Coastal Council,* 304 S.C. 376, 378, 404 S.E.2d 895, 896 (1991). McQueen likewise bought his property prior to the 1977 enactment of the Coastal Zone Management Act, under which he is unable to prepare his lots for building, an activity allowed when he bought the property. As the United States Supreme Court observed in *Lucas:*

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon,* 260 U.S., at 413, 43 S.Ct., at 159. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the

> possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard,* 444 U.S. 51, 66-67, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (prohibition on sale of eagle feathers). In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.
>
> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S., at 426, 102 S.Ct., at 3171-- though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.

Lucas, 505 U.S. at 1027-1029, 112 S.Ct. at 2899-2900.

It is the 1977 regulations and their progeny which have deprived McQueen of the ability to develop his lots, an expectation he clearly had when he purchased the lots over 30 years ago. McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots. *See Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.... So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.").

The Coastal Council again tries to distinguish this case from *Lucas* on the basis that Lucas merely wanted to build on his property, whereas McQueen wants to "alter the character" of his lots.[5] We find this distinction to be without merit. The definitive issue is what rights McQueen possessed when he purchased the lots and, just as the right to build was one of Lucas's rights, the right to add a bulkhead and fill were McQueen's at the time of purchase.

Further, the Coastal Council argues that, although he is unable to build on his lots, McQueen has not lost all economically beneficial use of his land. The Supreme Court stated the following rule in determining whether a taking has occurred:

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Lucas, 505 U.S. at 1019, 112 S.Ct. at 2895.

Regrettably, the rhetorical force of the "deprivation of all economically beneficial use" rule is not imbued with precision. In any event, we avoid this difficulty in the present case since the master found the denial of the permit left each of McQueen's lots without any economically beneficial use. In our opinion, there is evidence to support the master's finding.

McQueen testified that he is unable to do anything

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[5] The Coastal Council also argues that McQueen knew his lots were eroding for some time, and that he failed to take preventative measures earlier. However, the Council cites no legal precedent for this duty, and as such, its conclusory argument will not be considered. *Solomon v. City Realty Co.,* 262 S.C. 198, 203 S.E.2d 435 (1974) (conclusory exceptions are deemed effectively abandoned on appeal).

with either lot, including park a boat on one. The only use of the land available to McQueen after the permit denials the Council could show was "[r]ecreational, aesthetic use" that the Council's own expert testified is "really probably not directly recreational." The Council employee conceded that the recreational value to McQueen is "kind of indirect," stating, "I don't think Mr. McQueen would like everybody to come out there to crab or fish on his lots." This use does not truly benefit McQueen. We hold McQueen has suffered a textbook taking.

Just Compensation

Because we uphold the master's finding that there was a taking, McQueen is entitled to compensation. McQueen testified he paid $2,500 for the lot he purchased in 1961 (the 53rd Avenue lot) and approximately $1,700 for the one he purchased in 1963 (the 48th Avenue lot). He testified he had received offers of $50,000 on each of the two lots. However, McQueen also stated the current tax assessment value for each of the two lots was $22,800. Therefore, we find there was insufficient evidence in the record to support the master's determination that McQueen was entitled to a total of $100,000 as compensation for the taking of both lots. McQueen did not directly testify as to the value of the two lots. The record contains a response by McQueen to a cross-examination query that he received *offers* on the two lots. This testimony does not comport with the rule in South Carolina that a landowner may give testimony regarding the value of his property. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981) (a property owner, familiar with his property and its value, may give his estimate as to its value, even though he is not an expert); *South Carolina State Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (same).

CONCLUSION

For the foregoing reasons, we hold the Coastal Council's denial of McQueen's permit applications for the two lots deprives him of all economically beneficial use of the land and constitutes a taking for which McQueen is entitled to compensation. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798. There is insufficient evidence in the record to support the master's determination as to the amount of compensation. The issue of just compensation is remanded to the circuit court for a determination of the amount of compensation. The amount of compensation shall be determined as of the date of the taking. *United States v. Eltzroth,* 124 F.3d 632 (4th Cir.1997). Accordingly, the decision of the master is affirmed in part, reversed in part, and remanded to the circuit court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., concurs.

CONNOR, J., concurs in part and dissents in part in a separate opinion.

CONNOR, J. (Concurring in part and dissenting in part.):

I agree the record contains sufficient evidence to support Coastal Council's decision to deny the permits at issue. I also concur that delays in the permitting process are irrelevant to the merits of this appeal. However, I respectfully disagree with the majority that a taking has occurred, believing the facts of this case to be clearly distinguishable from those in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). I would reverse the master on the takings issue.

We are bound by the factual findings of the Coastal Council unless no substantial evidence exists to support them. *Guerard v. Whitner,* 276 S.C. 521, 280 S.E.2d 539

(1981). Council's facts follow.

McQueen bought the 53rd Avenue lot in 1961 for $2,500 and the 48th Avenue lot in 1963 for $1,700. Each lot is valued at $22,500 for tax purposes.

Both unimproved lots are located on filled, dead-end, salt water canals. Both have "substantially reverted to wetlands" and constitute "predominantly critical area." Most, if not all, of the other lots in this area contain improvements and some type of bulkhead or retaining wall.

The 48th Avenue lot contains "borrichia, spartina patens and spartina alterniflora." It is "high marsh," which "serves the vital function of acting as a buffer and a filter from sediments and run-off." The lot provides "habitat for birds, shellfish, and fish."

The 53rd Avenue lot, which has a lower elevation, attains "greater tidal flow." It is "unvegetated, filled with brack and other decaying critical area plants," having "tidal inundation reaching from the canal to the road." The lot serves as an "integral part of the estuarine environment as marine transport areas, for larval forms of shrimp and other marine life."

Even though erosion on the lots began around 1974, as late as 1989 the condition was still "not characterized as severe." McQueen "took no action to protect his property from erosion" from the time he purchased it until he initiated these applications.[6]

The majority finds this case remarkably similar to *Lucas*. I believe these facts are quite distinguishable from those in *Lucas*.

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[6] The hearing officer, in his Findings of Fact and Recommendations, reported McQueen met a Coastal Council representative at his lots between 1982 and 1984 to discuss the options concerning his property.

Lucas paid $975,000 for two lots, intending to build residential homes. *Lucas,* 505 U.S. at 1006, 112 S.Ct. at 2888. Two years later, the state passed legislation which basically prohibited Lucas from building habitable structures on his land. *Id.* at 1007, 112 S.Ct. at 2888. The United States Supreme Court held Lucas' ability to build on his property was contained in the "bundle of rights" he acquired when he first bought the property. *Id.* at 1027, 112 S.Ct. at 2899. The Court reasoned under these facts the state had taken Lucas' property without just compensation in violation of the Fourteenth Amendment, if it sought to regulate uses which were not already prohibited by background principles of nuisance and property law. *Id.* at 1031, 112 S.Ct. at 2901.

McQueen bought his property in the early 60's. The state Legislature passed the Coastal Zone Management Act, which prohibited the filling of marsh, in 1977. Over time, nature began reclaiming McQueen's lots. McQueen did nothing. McQueen's neighbors sought and gained permits to build bulkheads or retaining walls to protect their property from erosion. McQueen did nothing. McQueen met with a representative of Coastal Council sometime between 1982 and 1984 to ascertain his alternatives. Afterwards, McQueen did nothing. The process of erosion continued, until McQueen's property basically reverted back to marshland. Still, McQueen did nothing. Finally he applied for a bulkhead and backfill permit in 1991 so that he could build on his property. Now, McQueen wants the state to compensate him because he says a state regulation has made his property economically worthless.

The majority finds "the case at bar epitomizes a remarkable similitude to *Lucas.*" It goes on to point out both Lucas and McQueen were denied the right to build on their property because regulations with certain restrictions were passed; these regulations were not in force when they first purchased their property. However,

McQueen was not prohibited from building a house. He was prohibited from backfilling marsh, which he would not have had to do at all had he been a responsible landowner.

Even though the court in *Lucas* to some extent enumerated a bright- line test for ascertaining whether a taking had occurred, it still required a limited case-by-case analysis by remanding for South Carolina to make a determination whether the prohibited action violated any principles of state nuisance *and* property law. *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901. In remanding the *Lucas* case to the state of South Carolina, Justice Scalia, writing for the majority, explained the state had to do more than "proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest." *Id.* at 1031, 112 S.Ct. at 2901. Rather, it had to "identify background principles of nuisance *and property law* that prohibit the uses he (Lucas) now intends in the circumstances in which the property is presently found." *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2902 (emphasis added). *See also* 106 Harv.L.Rev. 163 at 272-73 (1992). ("[R]egulation that renders property valueless will be exempt from compensation only when it prohibits that which common-law nuisance principles *or other 'background principles'* have always prohibited.") (emphasis added).[7]

In *Lucas,* Justice Scalia quoted Lord Coke, who said, "[w]hat is the land but the profits thereof?" *Lucas,* 505 U.S. at 1017, 112 S.Ct. at 2894 (quoting 1 E. Coke, *Institutes,* ch. 1, § 1 (1st Am.Ed.1812)). In 1994, the Federal Circuit of the United States Court of Appeals,

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[7] In a case such as McQueen's, where a property owner does nothing, even though cognizant external forces are detrimentally affecting his property, analogies can be drawn to background principles of state property law such as adverse possession, staleness of claims, and even the statute of limitations.

interpreting *Lucas* in light of the entire history of regulatory takings, held courts must consider whether or not the property owner had distinct "investment-backed expectations" in determining whether or not a regulatory taking had occurred. *Loveladies Harbor, Inc., et al. v. United States,* 28 F.3d 1171 (Fed.Cir.1994). *See also Property Myths, Judicial Activism, And The Lucas Case,* 23 Envtl.L. 907, 916 (1993) ("In the final analysis, from a property lawyer's perspective, Lucas is a flawed decision because it assumes that property rights amount to developmental rights.").

Under a *Lucas* and *Loveladies Harbor* analysis, I do not believe the state has taken McQueen's property. McQueen sat idly by for almost thirty years, observing his land eroding as most of his neighbors applied for and received permits to build bulkheads or retaining walls to protect their property. Meanwhile, nature reclaimed McQueen's property. As the hearing officer stated in his report, "[t]his lot, by the passage of *time* and *tides* for the past 30 years, has become unbuildable." (Emphasis added).

The majority finds the fact that McQueen's neighbors have been granted permits indicates McQueen should be granted this same right. The majority cites the following language from *Lucas:* "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition ... So does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Lucas,* 505 U.S. at 1031, 112 S.Ct. at 2901. However, the omitted phrase reads as follows: "[T]hough changed circumstances or new knowledge may make what was previously permissible no longer so." *Id.* The record contains no evidence any of McQueen's neighbors asked for permits to backfill marsh, the prohibited activity here. Rather, prior to the point in time when their property would need backfill, they apparently requested and

received permits for bulkheads or retaining walls.

Moreover, Coastal Council held McQueen took no actions to protect his investment, and therefore failed to show he had "investment-backed expectations" under *Lucas* and *Loveladies Harbor*. As Council succinctly stated, McQueen's "expectations are relative to the measures he took to protect his investment."

I agree with Council. McQueen knew his lots were eroding and failed to act to protect his property. Now that the situation has become so critical, in order to build, he has had to request permission to violate state regulations prohibiting backfilling marsh, he cannot claim entitlement to compensation because the state "took" his property.

I would reverse on the takings issue.

APPENDIX E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL CIRCUIT
SAM E. MCQUEEN, Plaintiff,	)	Case No. 94-CP-26-3154
-vs-	)	FINAL ORDER
SOUTH CAROLINA COASTAL COUNCIL, n/k/a SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT, Defendant.	)	

TRIAL JUDGE:	John L. Breeden, Jr.
DATE OF HEARING:	January 5, 1996
PLAINTIFF'S ATTORNEY:	Ronald R. Norton
DEFENDANT'S ATTORNEY:	Mary D. Shahid
COURT REPORTER:	Grace Hurley

THIS MATTER came before this Court pursuant to the summons and complaint of the Plaintiff whereby the Plaintiff sought relief from the Defendant's denial of permit applications submitted to the Defendant by Plaintiff. The Plaintiff, by these applications, sought to construct a bulkhead on two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are located on man-made canals and were created by fill. The lots are

Lot 37, Block Q-1, located on 53rd Avenue, and Lot 13, Block L-1 on 48th Avenue. For ease of reference throughout this Order, the lots will be referred to as the 53rd Avenue lot and the 48th Avenue lot. The matter came before this Court on January 5, 1996, for review pursuant to §48-39-180, Code Of Laws of South Carolina. The matter was referred to this Court by the Circuit Judge to be heard with finality, with any appeal being directly to the Supreme Court. Upon hearing argument of counsel, reviewing the entire transcript from the record below, reviewing the memorandum of law and supplemental memorandum of law submitted by each party, and upon review of all exhibits, and by the findings of fact and conclusions of law as set forth below, it is the Order of this Court that the Plaintiff shall be entitled to just compensation. The denial of the Plaintiff's permits renders the lots valueless and deprives Mr. McQueen of all economically viable use of his land thereby constituting a taking of private property under the Fifth Amendment of the United States Constitution. The Defendant shall pay just compensation to the Plaintiff for a taking of said property in the sum of $50,000.00 per lot for each respective lot, for a total of $100,000.00.

FACTUAL BACKGROUND

The Plaintiff, Sam McQueen, a longtime resident of Horry County is the owner of two separate, non-contiguous lots in the Cherry Grove Section of North Myrtle Beach. Both Lots are located on man-made canals and were created by fill. Lot 37, Block Q-1, located on 53rd Avenue, was purchased in 1961 and Lot 13, Block L-1, on 48th Avenue, was purchased in 1963. Both of the lots are unimproved and Mr. McQueen has been paying taxes on the lots since their purchase.

In 1991, Mr. McQueen applied to the South Carolina Coastal Council, now the South Carolina Department of Health and Environmental Control Office of Ocean and

Coastal Resource Management (hereinafter OCRM), for two permits, one for each lot, to construct bulkheads. The primary purpose for construction as stated on the applications was for erosion control, both as to his own lots as well his neighbors. Apparently, because of the lack of bulkheads the wash from the high tides was eroding behind the neighboring bulkheads. Secondly, the bulkheads would provide Mr. McQueen with buildable lots as each lot is one of the few remaining undeveloped, unbulkheaded lots in the area.

For some yet unexplained reason, the Charleston Office of the OCRM acted on only one of the lots, Lot 37, Block Q-1, on 53rd Avenue. On January 21, 1992, a permit was issued on this lot with the special condition that the bulkhead be located 75 feet from the street. (SCCC Exhibits 1, 2). Because of the setback requirements of the city of North Myrtle Beach, Mr. McQueen requested 90 feet from the street to make the lot a more buildable lot, an obvious distance of only 15 more feet.

Again, the OCRM did not issue a written permit on Lot 13, Block L-1, on 48th Avenue, even though it is mandatory that all permit applications be acted upon within 90 days after the application is filed. §48-39-150(c), Code of Laws of South Carolina. The testimony at the evidentiary hearing, however, reveals that Mark Caldwell, biologist and regional permit administrator for the Myrtle Beach office of the OCRM, recommended approval of the 48th Avenue permit. (TR page 13, lines 2-24; page 23, lines 18-25; page 24, lines 1-2). This is confirmed by Richard Chinnis, permit coordinator for the OCRM. (TR page 66, lines 2-5). Mr. McQueen, however, never received the written permit.

As a result of the lack of action, mishandling and confusion caused by the OCRM, the OCRM, by letter dated April 2, 1993, informed Mr. McQueen's attorney that the only way to correct the confusion would be to submit reapplications. It should be noted that Mr.

McQueen first applied for a bulkhead permit in July, 1991, and now in April of 1993 he is being told to reapply. The significance of this is that two years of erosion had occurred as a result of the OCRM's inaction and/or mishandling of the application.

On June 4, 1993, Mr. McQueen, through the services of Mike Wooten, P.E., of DDC Engineers, Inc., resubmitted two permit applications to the OCRM. These applications were received by the OCRM on June 8, 1993, as shown on their date stamped letter. (See SCCC Exhibit 10G). Again, these dates are important in that they show the OCRM again failed to comply with their own mandatory regulations requiring permits to be acted on within 90 days of filing. On September 13, 1993, more than 90 days after the applications were filed, the OCRM issued denial letters for both lots.

While the OCRM denied the permits, all other agencies requiring input voiced no objection. The U.S. Army Corp of Engineers, the S.C. Department of Health and Environmental Control (of which the OCRM is now a subsidiary), the S.C. Ports Authority, the S.C. Department of Archives and History, voiced no objections. The S.C. Wildlife and Marine Resources offered no objection provided the bulkhead is placed against the existing erosioned scarp and landward of the wetland vegetation. Mr. McQueen's neighbors requested in writing the issuance of the permit. (See SCCC Exhibits 7, 8, 10H, 10I, 11, 12, 13, 14).

From the denial of the permits on September 13, 1993, the matter was submitted to the Honorable Robert J. Moran, Jr., hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the September 13, 1993, denial of the permit for the 48th Avenue lot, but reversed the OCRM's denial of the permit on 53rd Avenue and recommended approval of the bulkhead on 53rd Avenue, subject to the special conditions placed on the lot in 1992. The OCRM refused

to follow their hearing officer's recommendations, denied both permits again, and, then, the Appellate Panel voted to uphold the denials.

It is from the denial of the permit applications that Mr. McQueen sought relief from the Circuit Court. First, Mr. McQueen sough review of the OCRM's action "de novo" pursuant to §48-39-180, Code of Laws of South Carolina. Second, if the Court determined the permit denial by the OCRM was correct, Mr. McQueen sough to have the Court determine that the OCRM's action is an unconstitutional taking under the Fifth and Fourteenth Amendments of the United States Constitution, the South Carolina Constitution, §48-39-30(c), Code of Laws of South Carolina, and §48-39-180, Code of Laws of Couth Carolina, requiring the OCRM to pay just compensation to Mr. McQueen.

LEGAL ANALYSIS

I. The Denial of Plaintiff's Permit Renders Plaintiff's Lots Valueless and Constitute a Taking of Private Property Under the Fifth and Fourteenth Amendments of the U.S. Constitution requiring the Payment of Just Compensation.

Plaintiff, Sam McQueen, is entitled to just compensation pursuant to the Fifth and Fourteenth Amendments of the U.S. Constitution as well as the South Carolina Constitution and §§48-39-30 and 48-39-180, Code of Laws of South Carolina. See *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. US 119 L.Ed.2d 561 and rev'd US 120 L.Ed.2d 798 (June 29, 1992).

The Panel in its Final Order denies its action is a taking, relying on *Carter vs. The South Carolina Coastal Council* (Final Order page 5, paragraph 3). The Panel's reliance on *Carter*, a 1984 South Carolina Supreme Court case is misplaced and an error of law, in light of the United States Supreme Court's ruling in *Lucas*, a 1992

decision. The OCRM's erroneous reliance on *Carter* is based on the following analysis. First, the South Carolina Supreme Court cites *Carter* to uphold its decision in *Lucas* that a regulation designed to regulate the use of property where uncontrolled use would be harmful to the public interest would not necessarily constitute a taking. Chief Justice David Harwell, in his dissenting opinion in *Lucas*, recognized that there are situations where state regulation will be a taking. The U.S. Supreme Court agreed with the dissent and reversed the South Carolina Supreme Court. The Panel's decision is, therefore, based on an error of law. *Lucas* requires compensation for a regulatory taking when the taking deprives the owner of all economically beneficial use of the property.

When the owner of real property has been called upon to sacrifice all economically beneficial use of the property in the name of common good, that is, to leave his property economically idle, he has suffered a "taking" within the meaning of the Fifth Amendment. *Lucas*, *supra*, pp. 2886, 2887. It is clear from the record that the action by the OCRM constitutes a taking. The critical area defined by the biologist envelopes the entire portions of each lot. The sketches drawn by the biologist and apparently relied on by the Council support this entire taking. The testimony of the OCRM as well as that of Mr. McQueen confirm the regulation as depriving Mr. McQueen of all economically beneficial use of his land. Mr. Mark Caldwell testified that without the bulkhead the lots might have indirect recreational use and aesthetic use to the owner. (TR page 19, lines 13-25; page 20, lines 1-6). Mr. Chinnis confirmed this. (TR page 72, lines 23-25; page 73, lines 1-8). Mr. McQueen also testified that without bulkheads he could do nothing with his lots. (TR page 80, lines 1-6). No evidence was submitted by the Defendant to support the position that Mr. McQueen had any economically viable use of his lots. Clearly, the action by the OCRM in enforcing its regulation, denies Mr. McQueen of all economically beneficial use of his

property, thereby requiring just compensation. Therefore, the regulation has the effect of declaring off limits all economically productive or beneficial use of the land. When this happens, as stated in *Lucas*, "compensation must be paid to sustain it. The state may not transform private property into public property without compensation." *Lucas, supra.*

A careful analysis of *Lucas* to the facts of this case show the factual similarities to be almost identical such that the result in *Lucas* should be the result in this case on the taking issue. First, the Court in *Lucas*, required compensation unless the state can show that the owner's proscribed use was not part of the owner's title to begin with. The U.S. Supreme Court found that Lucas' proscribed use, the proposed building of a habitable structure, was clearly part of the owner's title to begin with. Certainly, in this case, Mr. McQueen's proscribed use, the building of bulkheads to control erosion and make the lot suitable for construction, was part of the owner 's title to begin with. In looking at the proscribed use, the U.S. Supreme Court put particular emphasis on the fact that Mr. Lucas purchased his lots in 1986, before the 1988 Beachfront Management Act, which deprived Lucas of his use. In this case, the testimony reveals that Mr. McQueen purchased one lot in 1961 and the other in 1963, before the 1977 Coastal Zone Management Act. Clearly, prior to and but for the Act in *Lucas*, Mr. Lucas would have been able to build his house. Clearly, prior to and but for the Act in this case, Mr. McQueen would have been allowed to build his bulkheads. The *Lucas* Court placed particular importance on the fact that before a regulation could deny compensation, the State must show the use to which the owner intends for his property would not have been allowed prior to the regulation, based on principles of nuisance and property law. "Only on this showing can the State fairly claim that ... the Act is taking nothing." *Lucas, supra*, p. 2902. Without question, the use for which Mr. McQueen now intends

would have been allowed both on principles of nuisance, or the lack thereof, and property law and would have been allowed prior to 1977. On remand, the South Carolina Supreme Court held that there was no basis under common law sufficient to restrain Lucas from the desired use of his land. *Lucas vs. South Carolina Coastal Council*, _____ SC _____, 424 S.E.2d 484 (1992). The South Carolina Supreme Court acknowledged that unless the Coastal Council could identify nuisance or property law sufficient to restrain construction, a compensable taking had occurred. The South Carolina Supreme Court's own research could not uncover any such common law principle. *Lucas, supra.*

The South Carolina Supreme Court recently revisited this aspect of the taking issue. *Grant vs. S.C. Coastal Council*, Sup. Ct. Adv. Sheets, Opinion No. 24302, (August 21, 1995). In *Grant*, the Court denied a taking requiring compensation because Grant purchased his property was critical area at the time of purchase in 1987. The Court held that Grant's right to use his property, even though physically altered by Hurricane Hugo, was not altered from use proscribed when he originally acquired title. The Court cited *Lucas* to sustain this ruling. The distinction between *Grant* and this case is obviously that when Grant purchased in 1987, critical area was regulated since 1977. However, when Mr. McQueen purchased in 1961 and 1963, critical area would not be regulated until 1977.

The Panel also cites *Loveladies Harbor, Inc.* to justify its decision. (Final Order, page 6). *Loveladies* contained a three prong test for determining if there has been a regulatory taking.

1) If there was a denial of economically viable use of the property as a result of the regulatory imposition;

2) the property owner had distinct investment-backed expectations; and

3) it was an interest vested in the owner, as a matter of state property law, and not within the power of the state to regulate under common law nuisance doctrine.

The Panel, while stating that *Loveladies* is a freshwater wetlands case and refusing to concede that *Loveladies* and successive freshwater wetland cases control their disposition of the issue, proceed to argue that Mr. McQueen fails to satisfy the second prong of the test because of the measures Mr. McQueen took to protect his investment. (Final Order, page 6). This denial, then reliance on *Loveladies*, demonstrates that the Panel wants to have it both ways. In point of fact, however, as stated above, Mr. McQueen not only acted to protect his investment, but acted in a timely fashion and within the time in which the OCRM's own documents demonstrate the permits could have been issued. I do not find the Defendant's argument that the Plaintiff had no investment-backed expectations to be compelling. The testimony by Mr. McQueen indicates that his intent was to ultimately build on each lot. The fact that a period of time may have passed between purchase of the lots and a decision to seek a permit is insufficient to conclude that the property owner had no investment-backed expectations. In addition, the Defendant failed to submit any evidence to support this argument regarding the Plaintiff's failure to meet this second prong of the *Loveladies* test. Obviously, as shown above, the first, second and third prongs of the *Loveladies* test have been met.

With this analysis in mind, this Court must now seek to determine the amount of just compensation to be paid to Mr. McQueen for this taking. The record is clear on this. Mr. McQueen testified he had been offered over $50,000.00 for the lots. (TR page 82, lines 11-13). The law is clear that a property owner can offer any testimony as to the value of his property. The OCRM did not offer

testimony to contradict Mr. McQueen's values. This uncontradicted testimony establishes a value of $50,000.00 per lot for purposes of compensating Mr. McQueen for the taking.

Under the *Lucas* decision, Mr. McQueen is entitled to compensation for the regulatory taking. The factual aspects of this case parallel *Lucas*. Mr. McQueen purchased his property prior to enactment of the legislation. But for the legislation, Mr. McQueen would be entitled to his bulkheads. If the OCRM wishes to claim these lots for the public good and deprive Mr. McQueen of all economically beneficial use of his lots, OCRM must pay just compensation.

Based upon the foregoing Factual Background and Legal Analysis, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1) I find that the Plaintiff is a citizen and resident of Horry County, South Carolina, and the Defendant is a governmental agency organized under the laws of the State of South Carolina, and that the parties and the subject matter of this action are properly before this Court.

2) I find that the factual background and the legal analysis are incorporated into these findings of fact as well as the conclusions of law as if fully repeated herein.

3) I find that the Plaintiff is the owner of two non-contiguous lots in North Myrtle Beach, South Carolina. The lots are on man-made channels and were created by fill. The lots are Lot 37, Block Q-1, on 53rd Avenue, and Lot 13, L-1, on 48th Avenue. The 53rd Avenue lot was purchased in 1961 and the 48th Avenue lot was purchased in 1963.

4) I find that the Plaintiff applied to the South Carolina Coastal Council, now known as the South

Carolina Department of Health and Environmental Control Office of Ocean and Coastal Resource Management, for two permits, one for each lot, to construct bulkheads.

5) I find that the purpose for construction was for erosion control and also to insure the buildability of each lot.

6) I find that on January 21, 1992, a permit was issued for construction of a bulkhead on the 53rd Avenue lot, with certain special conditions being that the bulkhead be located 75 feet from the street.

7) I find from the testimony, for some unexplained reason, OCMR did not issue a permit for the 48th Avenue lot even though the testimony reveals that the biologist and regional permit administrator in the Myrtle Beach office of the OCRM recommended approval of the 48th Avenue permit.

8) I find that as a result of lack of action, mishandling and confusion caused by the OCRM, the OCRM instructed Mr. McQueen to resubmit his applications to correct the confusion.

9) I find that on June 4, 1993, the Plaintiff resubmitted two permit applications to the OCRM and said applications were received by the OCRM on June 8, 1993.

10) I find that on September 13, 1993, the OCRM issued denial letters for both lots. I find that these denials were issued more than 90 days after the date of the filing of the application, which is contrary to the mandatory requirements of the OCRM to act upon applications within 90 days of the filing.

11) I find that while the OCRM denied the permits, all other agencies requiring input voiced no objection to the issuance of the permit.

12) I find that from the denial of the permits, the matter was submitted to the Honorable Robert J. Moran, Jr., a hearing officer appointed by the OCRM, to make findings and recommendations. Mr. Moran upheld the denial of the permit on the 48th Avenue lot, but reversed the OCRM's denial on the 53rd Avenue lot and recommended approval, subject to the special conditions placed on the lot in 1992.

13) I find that the OCRM did not follow the hearing officer's recommendations and denied both permits again and then the appellate panel voted to uphold the denials.

14) I find that from the denial of the permit applications, the Plaintiff sought relief from this Court pursuant to statute as well as the South Carolina and United States Constitutions.

15) I find that the action of the OCRM in denying Plaintiff his permits to construct bulkheads, as well as in defining the lots as critical area, deprive Mr. McQueen of all economically beneficial use of his property and, therefore, constitutes a taking within the meaning of the United States and South Carolina Constitutions as is set forth in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed. 2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d. 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

16) I find that as a result of the taking, and based upon the testimony, Mr. McQueen is entitled to receive the sum of $50,000.00 for each lot, for a total of $100,000.00, as just compensation.

CONCLUSIONS OF LAW

Based upon the foregoing, I make the following conclusions of law.

17) I conclude that the parties and the subject matter of this action are properly before this Court.

18) I conclude that the conclusions as set forth in the factual background, as well as the legal analysis, are

incorporated into and made a part of these conclusions of law as if fully repeated herein.

19) I conclude the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798 (June 29, 1992).

20) I conclude that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00.

21) I conclude that the Defendant shall pay said sum to the Plaintiff within 30 days of the date of this Order.

It is, therefore, **ORDERED, ADJUDGED AND DECREED** that the action of the OCRM in defining each lot as critical area and in denying the Plaintiff the right to construct bulkheads pursuant to his applications denies the Plaintiff all economically beneficial or viable use of his property and constitutes a taking within the meaning of the United States and South Carolina Constitutions, as analyzed in *Lucas vs. South Carolina Coastal Council*, 116 L.Ed.2d 455, 112 S.Ct. 436, motion gr. U.S. 119 L.Ed.2d 561, rev'd U.S. 120 L.Ed.2d 798. (June 29, 1992).

And it is further **ORDERED, ADJUDGED AND DECREED** that as a result of the taking as set forth above, the Plaintiff is entitled to just compensation in the sum of $50,000.00 for each lot, for a total of $100,000.00, to be paid within 30 days of the date of this Order.

AND IT IS SO ORDERED.

s/ John L. Breeden, Jr.
John L. Breeden, Jr.
Master in Equity

Dated: Feb. 28, 1996
Conway, South Carolina

APPENDIX F

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Costal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

ORDER

The United States Supreme Court vacated this Courts opinion in *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded it in light of *Palazzolo v. Rhode Island*, __ U.S. __, 121 S.Ct. 2448, 150 L.E.2d 592 (2001). *See McQueen v. South Carolina Dep't of Health*, __ U.S. __, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001).

Respondent filed a Motion to Amend Order with this Court on February 20, 2002. Petitioner filed a Petition to File a Late Return and a Return to Respondent's Motion on March 8, 2002. We grant Petitioner's request to file a late return. We deny Respondent's Motion to Amend by adding proposed question IV. Instead we vacate our previous Order and substitute the following.

This Court orders each party to submit briefs answering the following questions:

I. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?

II. If not, do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?

III. If not, may a court use investment-backed expectations to determine McQueen's damages?

Petitioner must submit briefs within thirty (30) days from the issuance of this Order. Respondent must submit briefs within thirty (30) days from the date of service of Petitioner's brief. Petitioner must submit its reply brief within ten (10) days from the date of service of Respondent's brief. Briefs should comply with the requirements of Rule 208, SCACR.

s/ Hoefer Toal C.J.

s/ James E. Moore J.

s/ John H. Waller Jr. J.

s/ E.C. Burnett III. J.

s/ Costa M. Pleicones J.

Columbia, South Carolina

March 22, 2002

APPENDIX G

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
The Honorable John L. Breeden, Jr., Master-in-Equity

Case No. 94-CP-26-3154

Sam B. McQueen, Respondent,

v.

South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (formerly known as South Carolina Coastal Council) Appellant.

PETITION TO FILE LATE RETURN AND RETURN TO MCQUEEN'S MOTION TO ADD QUESTION

The Department respectfully requests that this court allow the Department to file a late return to McQueen's Motion seeking to add a question. The Petition for filing a late Return to this Motion is based on the fact that the undersigned counsel for the Department is preparing to leave her employment with the Department, effective March 15, 2002. In the process of closing out numerous legal matters with the Department, the undersigned missed the importance of responding to this motion in a timely fashion. Accordingly, the Department seeks to file the following return:

1. The Department agrees with McQueen that, in light of the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, __U.S. __, 121 S.Ct. 2448, 150 L.E.2d 592 (2001), it is appropriate for the court to address the threshold question of whether a lack of reasonable investment-backed expectations can, depending on the facts and circumstances of the particular case, bar a regulatory taking claim, including a categorical taking claim. Accordingly the Department agrees with McQueen that the Court's order dated January 10, 2002 should be revised to instruct the parties to address the issue.

2. However, the Department objects to the questions as proposed by Respondent. In particular, the Department objects to subpart (B) of this question because it requests the Court to revisit a factual issue and does not represent an appropriate question for the Court to address or remand from the U.S. Supreme Court's decision in *Palazzolo*. The remand should focus on whether the legal rulings in *Palazzolo* draw into question any of the court's legal analysis in its initial decision. The remand should not provide the opportunity to relitigate issues of fact.

3. The Department also questions whether question three in the Court's January 10th Order requires a separate analysis in view of the close interrelationship between that question and the threshold question of whether a lack of reasonable investment-backed expectations can bar a categorical taking claim. The Department submits that the role of the expectations factor in takings analysis will be most usefully addressed in response to a single, general question on the expectations issue.

4. Accordingly the Department proposes that the Court revise its January 10th Order to instruct the parties to address a single question on the "expectation" issue, in lieu of both existing question three and proposed question four. The Department proposes that this question should read as follows: "In light of *Palazzolo*, what is the role of

the reasonable investment-backed expectation factor in a categorical regulatory taking case?"

Respectfully submitted,

s/Mary D. Shahid
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Attorney for SC Department of
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Office of Ocean and Coastal
Resource Management

APPENDIX H

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

MOTION TO AMEND ORDER

The Respondent, by and through his undersigned attorneys, moves the Court to amend its Order dated January 10, 2002, directing the parties to submit briefs on three issues. Respondent respectfully requests that the Court include the following question:

IV. Does the U.S. Supreme Court's decision in *Palazzolo v. Rhode Island*, 533 U.S. ___, 121 S.Ct. 2448 (2001), mean that Mr. McQueen (A) need not prove that the challenged restriction interferes with his reasonable investment-backed expectations, because he has raised a categorical takings claim, and that (B) even if relevant to a categorical takings claim, his reasonable investment-backed expectations are not extinguished by a delay in seeking development permits?

Said Motion is made upon the grounds that

A. The United States Supreme Court granted the Respondent's Petition for Writ of Certiori to the Supreme Court of South Carolina, vacated the South Carolina Supreme Court's opinion in *McQueen v.*

South Carolina Coastal Council, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded the case for reconsideration in light of *Palazzolo v. Rhode Island*, 533 U.S.____, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001).

B. That the U.S. Supreme Court's remand order indicates that it found *Palazzolo* "sufficiently analogous and, perhaps, decisive to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam); see also *Lawrence v. Chater*, 516 U.S. 163, (1996) (explaining that an order granting certiorari, vacating the lower court decision, and remanding with instructions to reconsider that decision in light of an intervening U.S. Supreme Court precedent is appropriate when there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation").

C. That the Supreme Court's mandate thus calls on this Court to determine what effect *Palazzolo* had on its prior decision in this case.

D. That *Palazzolo* held that a regulatory takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." 121 U.S. at 2464.

E. That this Court previously held that Mr. McQueen had not suffered a taking, even though it was "uncontested the permit denial at issue here deprives [him] of all economically viable use of his property," *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), solely because "[h]is prolonged neglect of the property and failure to seek development permits in the face of ever more

stringent regulations demonsrtate a distinct lack of investment-backed expectations." *Id.* at 76.

F. That the three questions already posed by the Court do not include the critical question that we present here.

s/ Ronald R. Norton
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February 15, 2002

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APPENDIX I

The Supreme Court of South Carolina

Sam B. McQueen, Respondent,

v.

South Carolina Coastal Council, n/k/a South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management, Petitioner.

ORDER

The United States Supreme Court vacated this Courts opinion in *McQueen v. South Carolina Coastal Council*, 340 S.C. 65, 530 S.E.2d 628 (2000), and remanded it in light of *Palazzolo v. Rhode Island*, __U.S. __, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001). See *McQueen v. South Carolina Dep't of Health*, __U.S. __, 121 S.Ct. 2581, 150 L.Ed.2d 742 (2001). This Court orders the parties to submit briefs on the following issues:

I. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?

II. Do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?

III. May a court use investment-backed expectations to determine McQueen's damages?

Petitioner must submit briefs within thirty (30) days from the issuance of this Order. Respondent must submit briefs within thirty (30) days from the date of service of Petitioner's

brief. Petitioner must submit its reply brief within ten (10) days from the date of service of Respondent's brief. Briefs should comply with the requirements of Rule 208, SCACR.

s/Hoefer Toal C.J.

s/James E. Moore J.

s/John H. Waller, Jr. J.

s/E.C. Burnett III J.

s/Costa M. Pleicones J.

Columbia, South Carolina

January 10, 2002

Supreme Court, U.S.
FILED
SEP 29 2003
OFFICE OF THE CLERK

No. 03-159

In The
Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT (formerly known as SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

LESLIE W. STIDHAM,
Chief Counsel, OCRM
Counsel of Record
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QUESTION PRESENTED

Whether the South Carolina Supreme Court properly rejected, in a unanimous decision, a regulatory taking claim based on a state agency's denial of an application to bulkhead and fill an area of tidelands along the South Carolina coast which was created by natural erosion and as a result had become subject to public ownership and the longstanding South Carolina public trust doctrine.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management ("OCRM") respectfully requests that this Court deny the petition for a writ of *certiorari*, filed by Petitioner Sam B. McQueen ("Petitioner") to review the decision of the South Carolina Supreme Court in *McQueen v. South Carolina Coastal Council*, 580 S.E.2d 116 (S.C. 2003).

INTRODUCTION

Petitioner is challenging a unanimous decision of South Carolina's highest court that denied a taking claim based on the state's refusal to allow the filling of an area regularly inundated by the tides. He argues that South Carolina's application of its public trust doctrine – a state common law doctrine that protects certain important public interests in the area below the mean high water mark – somehow runs counter to this Court's case law recognizing that background principles of property and nuisance law can bar a regulatory taking claim. Not only does the South Carolina Supreme Court's decision correctly apply a longstanding common law background principle, it fully comports with this Court's regulatory takings decisions, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Moreover, the state court's decision also indicates that, as a result of erosion and the change of position of the shoreline, title to these lands passed to the state entirely.

The South Carolina Supreme Court acted well within the scope of the GVR order this Court issued in *McQueen v. South Carolina Dep't of Health and Envtl. Control*, 533 U.S. 943 (2001), in ruling that Petitioner need not be compensated by the state. Upon remand from this Court, the state court considered *Palazzolo*, applied the rule governing a total regulatory taking set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and concluded that under the circumstances of this case, the public trust doctrine constituted a valid background restriction on Petitioner's use of land that had become inundated by the ocean's tides. In doing so, the court relied in part on a well developed history of the public trust doctrine amply documented in South Carolina's judicial decisions stretching back over one hundred years. The state court's interpretation and application of this common law principle is entirely consistent with this Court's takings precedents, and properly affirms the state's traditional sovereign powers over tidelands within its own borders.

Contrary to Petitioner's claims, *see* Petition for a Writ of Certiorari ("Pet.") at 12, the court's opinion on remand does not conflict with *Lucas* and *Palazzolo*, but faithfully applies these precedents. Nor is there any significant conflict among the lower courts regarding application of the public trust doctrine in takings cases. Just three months ago, this Court denied *certiorari* in a similar case, which raised the issue of whether the state public trust doctrine, properly applied in accordance with state law, can constitute a background principle of state property law barring a regulatory taking claim. *See Esplanade Props., LLC v. City of Seattle,* 307 F.3d 978 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 2574 (2003). For several different

reasons, as explained below, a denial of *certiorari* is even more appropriate in this case, and justified by Petitioner's complete failure to present any considerations warranting review under Supreme Court Rule 10.

STATEMENT OF THE CASE

1. In 1961 and 1963, Petitioner purchased two lots, originally created by fill and located on saltwater canals, for $2,500 and $1,700, respectively. R. 209. Unlike his neighbors, Petitioner failed to apply for permits to fill and bulkhead his lots to protect them from erosion. Starting in the 1960's, the lots began to erode and change from dry land into marsh and mudflats, subject to the ebb and flow of the tides. R. 210-13. Petitioner did not apply for any permits to develop the lots until 1991, nearly 30 years later, when the lots had become inundated by the tides. Many of his neighbors, by contrast, had constructed bulkheads and developed their properties before any erosion occurred. R. 211-12.

2. In 1991, Petitioner applied to the United States Army Corps of Engineers ("Army Corps") and the Office of Ocean and Coastal Resource Management ("OCRM") (formerly known as the South Carolina Coastal Council) in the South Carolina Department of Health and Environmental Control for permits to build bulkheads and to fill the tidelands on both lots, in an attempt to backfill those areas that had eroded away. The Army Corps, which customarily informed the OCRM of such applications by issuing a joint notice, mistakenly issued a notice for only one of the lots. R. 155-56. Although the OCRM subsequently issued a permit for the lot, allowing construction of a bulkhead 75

feet from the street, Petitioner wanted a 90-foot setback. He consequently filed an administrative appeal of the permit.

3. Due to the Army Corps' mistake in failing to issue a notice to the OCRM for both lots, Petitioner resubmitted his applications. He sought to place 100 cubic yards and 200 cubic yards of fill in the tidelands area of the two lots, and to construct bulkheads 90 feet and 102 feet from the road, respectively. R. 275, 313. The OCRM denied both applications in 1993 because the filling would destroy certain public interests in the tidelands, especially fisheries. It determined that most of the lots was "critical area or salt water wetlands,"[1] R. 147, which were densely vegetated by plants growing below the mean high-water mark, R. 160. These plants provided food and habitat for fish and shellfish, served as a "natural buffer for high ground," and helped filter sediments and pollutants. R. 161-62.

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[1] In its most recent opinion, the South Carolina Supreme Court left no doubt that Petitioner's lands were and continue to be inundated by tidal flow. As the court noted,

> At the time of the [1994 OCRM] hearing, the majority of both lots had reverted to tidelands or critical area saltwater wetlands. This reversion was caused by 'continuous' erosion, although little change had occurred since the permits were originally sought in 1991. *The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street.* The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation. On both lots, only some irregular portions of high ground remain.

580 S.E.2d at 118. (emphasis added).

4. Petitioner appealed the denial of the permits to the Coastal Zone Management Panel, which affirmed the denial. He then sought judicial review of this decision before the South Carolina Circuit Court. A master-in-equity appointed by the court concluded that the permit denials constituted a taking and awarded Petitioner $100,000. R. 11. The South Carolina Court of Appeals affirmed in part and remanded for further consideration of the amount of compensation. *McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643 (S.C. Ct. App. 1998).

5. On appeal, the South Carolina Supreme Court reversed, finding that Petitioner had failed to demonstrate that he had distinct investment-backed expectations of developing the lots, in light of his failure to take action for thirty years while the lots slowly eroded away and became inundated by the tides. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 634-35 (S.C. 2000). Before the Supreme Court, the OCRM had also argued that background principles of state property law barred Petitioner's claim.

6. Petitioner sought review in this Court, which remanded the case for reconsideration in light of *Palazzolo*. 533 U.S. at 943. On remand, both parties submitted briefs discussing the impact of *Palazzolo* on Petitioner's takings claim. As directed by the South Carolina Supreme Court, the briefs also discussed the relevance of reasonable investment-backed expectations and background principles of law to Petitioner's takings claim. In its new opinion, the South Carolina Supreme Court examined *Palazzolo*, revisited Petitioner's takings claim, concluded

that Petitioner had been denied all economically viable use of the property,[2] but stated that background principles of property law, embodied in the state's public trust doctrine, barred Petitioner from establishing a taking under the circumstances of this case. *McQueen*, 580 S.E.2d at 119-20. In addition to its reliance upon the public trust doctrine, the court also recognized that, in accord with the traditional rule regarding changes in title boundaries and eroding shorelines, this formerly private land had been transferred into public ownership by operation of law. Petitioner seeks review for the second time from this Court.

REASONS FOR DENYING THE WRIT

Petitioner would have this Court believe that it is appropriate to review a unanimous decision, from the highest court in a state, interpreting a matter of state law. Yet, there is nothing about this case that requires review from the Court. Petitioner has failed to demonstrate under Supreme Court Rule 10(b) or (c) that the decision below raises an important federal question that should be settled by this Court. The decision below rests on state principles – the public trust doctrine and a state's presumptive title to tidelands – that do not involve a federal legal issue. Arising from, and based on a unique set of facts, this

[2] Contrary to Petitioner's representation, *see* Pet. at 8, the state repeatedly contested the question of whether the permit denials deprived Petitioner of all economically viable use of the property within the meaning of *Lucas*. *See* April 22, 2002 Brief of Petitioner, pp. 9-14; R. 146-147.

decision will not have national ramifications (contrary to Petitioner's assertion, *see* Pet. at 22), or upset settled expectations under either federal or state law.

The decision also demonstrates that the South Carolina Supreme Court fully complied with this Court's order to consider further its findings in light of *Palazzolo*. On reconsideration, the court properly followed both *Lucas* and *Palazzolo* in finding that the public trust doctrine prevents Petitioner from claiming a taking based on a denial of a permit to fill tidelands that formed over the course of thirty years. The state court's application of the public trust doctrine is consistent with that doctrine's longstanding history in South Carolina and well-established state control over tidelands below the mean high water mark. The state court's discussion of the state's presumptive title to Petitioner's submerged lands is, similarly, a reflection of state common law principles. For these reasons, as set forth in further detail below, this Court should deny the petition for a writ of *certiorari*.

I. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW AND IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

At its heart, this case is about a state's authority to apply settled definitions of the nature of property interests in coastal areas under state law. Far from constituting a new and expansive concept that will be used to deny takings claims across the country, *see* Pet. at 14, this case merely affirms certain public interests in submerged lands under the public trust doctrine and the state's presumptive title to submerged coastal lands. As this Court stated

in *Lucas*, 505 U.S. at 1031, the question of whether common law principles preclude a taking claim "is one of state law to be dealt with on remand." The South Carolina Supreme Court has accordingly determined this question by reference to the state's public trust doctrine – a narrow background principle that is geographically confined and within the state's purview to determine – and this Court should have no real interest in the state's resolution of this question under its own laws. *See Joy v. St. Louis*, 201 U.S. 332 (1906) (holding that changing property boundaries are a matter of state law to be determined by state courts); *see also Ward v. Illinois*, 431 U.S. 767, 772-73 (1977) (recognizing the binding nature of a state court's construction of state law).

Petitioner has failed to demonstrate how the decision below implicates a federal constitutional question. Both the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (including the application of background principles) are questions of state law. *See Lucas*, 505 U.S. at 1030 (discussing this Court's resort to "existing rules or understandings that stem from an independent source such as state law" in defining property interests); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (noting that the existence of a property interest may be determined by reference to state law principles) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). This Court has affirmed in numerous cases that the resolution by the highest court in a state of a matter of state law is not appropriate for federal review. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 & fn. 9 (1981) (refusing to overturn the construction of Louisiana law by the highest court of that state); *Hicks on*

Behalf of Feiock v. Feiock, 485 U.S. 624, 629-30 (1988) (declining to review a state court's conclusions of state law). Petitioner's attempts to wring a federal constitutional question out of the state's application of its property laws, *see* Pet. at 20-22, do not render this decision appropriate for review by this Court. There is nothing about the South Carolina Supreme Court's application of the state's own public trust doctrine to justify review by this Court.

Not only does the South Carolina Supreme Court's decision rest on a settled interpretation of state law, it also extends beyond the application of the public trust doctrine to Petitioner's lands. Petitioner fails to acknowledge the court's indication that he lost title to his lands altogether under longstanding common law principles that give the state a *jus privatum* interest in submerged coastal lands.[3] *See McQueen*, 580 S.E.2d at 119-20 (citing *Coburg Dairy, Inc. v. Lesser*, 458 S.E.2d 547 (1995)). Contrary to Petitioner's certified question, this case does not simply concern whether the public trust doctrine defeats his taking claim, *see* Pet. at 14, but also whether South Carolina can manage what have become public lands.[4]

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[3] This is in accord with the property laws of many states providing that the boundary between upland property and aquatic land owned by another entity (here the state) shifts as the line of high tide shifts. This reciprocal rule preserves expectations as borders defined by a natural feature move by accretion or as in this case, by erosion. *See, e.g. Horry County v. Woodward*, 318 S.E.2d 584, 586 (S.C. Ct. App. 1984). *Accord, Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) (state law controls the question of moving boundaries between uplands and aquatic lands owned by the states under the equal footing doctrine).

[4] The factual complexity of this case, and the ambiguous nature of the court's decision questioning whether Petitioner even retains an

(Continued on following page)

Moreover, it is Petitioner's own neglect of his property that brought about the limitations on, if not the complete transfer to the public of, his former property interests. After purchasing his lots in the early 1960's, Petitioner, unlike his neighbors, let them languish for nearly thirty years while tidal encroachment and erosion slowly converted the property into tidelands. As the South Carolina Supreme Court noted, 580 S.E.2d at 118, 120, Petitioner failed to exercise the proper care of a property owner with an interest in maintaining his property and preparing it for future development. This lack of diligence completely undercuts Petitioner's claim that he is entitled to develop his land in a manner contrary to common law principles and renders the instant case inappropriate for review by this Court.

Petitioner has also made no showing to support his assertion, *see* Pet. at 13-14, that the public trust doctrine threatens to transform the background principles inquiry into a categorical exception to takings liability. In over sixty years of takings litigation, spanning every published state and federal decision in the country, the public trust doctrine has been raised as a background principle in less than a dozen cases. Moreover, use of the public trust doctrine varies from state to state. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (emphasizing the unique and individualized nature of each state's application of the public

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ownership interest in his property, do not present the clear question that was posed in *Esplanade*, 307 F.3d at 978, of whether the application of the public trust doctrine to privately owned tidelands (that had not been created by erosion or encroachment) constitutes a valid background principle of law under *Lucas*.

trust doctrine). Any fear that this narrowly confined use of the public trust doctrine by the South Carolina Supreme Court will raise a national question or change the face of takings jurisprudence is unjustified and groundless.[5]

II. THE SOUTH CAROLINA SUPREME COURT PROPERLY COMPLIED WITH THIS COURT'S ORDER TO RECONSIDER ITS DECISION IN LIGHT OF *PALAZZOLO*.

Far from being wayward, *see* Pet. at 11, the South Carolina Supreme Court fully complied with this Court's GVR order, which merely directed it to give "further consideration" in light of *Palazzolo*. "Further consideration" to a case is all that a court must do to comply with a GVR order. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996). When granting *certiorari* for a GVR order, this Court allows for a more liberal showing of cause because such an order is not a final determination on the merits of a case, but merely a "strong suggestion" that there is a relevant change to the law that the lower court should examine. *Id.* at 168 (citing *Heckler v. Lopez*, 463 U.S. 1328,

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[5] Petitioner's claims that the South Carolina Supreme Court's decision would affect up to 374,234 acres of South Carolina wetlands, *see* Pet. at 21, is clearly erroneous. This estimate represents pure speculation, is based on unreliable extrapolations from estimates of the area of privately owned *non-coastal* wetlands in the state, and does not take into account the realistic development potential (or lack thereof) of many of these lands. The conditions governing Petitioner's former lots, which are located in shallow water immediately adjacent to a shore, in an area where it is (possibly) economically feasible to fill the wetlands, cannot be said to apply to every other area of tidelands in the state of South Carolina.

1330 (1983)); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964).

On remand, the South Carolina Supreme Court was not required to change the outcome of its decision after considering *Palazzolo*. *See Hughes Aircraft Co. v. United States*, 140 F.3d 1470, 1473 (Fed. Cir. 1998); *United States v. MCC Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992). Nor was the court required to limit its review of the case to the scope of its earlier decision. *See Lockheed Martin Corp. v. Space Sys./Loral, Inc.*, 324 F.3d 1308, 1310 (Fed. Cir. 2003) (on remand a court is not required to limit its analysis to the theory previously followed). Rather, the court was free to look to alternative facts and theories. *See Kotler v. Am. Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992) (when an entire judgment is vacated, the court can examine issues beyond the scope of the remand); *Moore v. Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989) (a vacate order erases the judgment and leaves no appellate record, allowing the court to reconsider issues not specifically addressed in the remand order). Therefore, contrary to Petitioner's claim, *see* Pet. at 10-11, the South Carolina Supreme Court acted well within the scope of its authority on remand when it ruled that the claim was barred under background principles of South Carolina's law.[6]

On remand, the South Carolina Supreme Court gave due consideration to *Palazzolo*, given that *Palazzolo* was a partial takings case that involved ripeness and statutory

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[6] Contrary to Petitioner's argument, the state fully briefed and argued the defense that the claim was barred under background principles of South Carolina law.

notice issues. Moreover, the court certainly did not dispute *Palazzolo's* rejection of the *per se* notice rule. While the court's previous decision may have raised a notice issue,[7] the decision on remand did not rely upon this contentious issue. *See McQueen*, 580 S.E.2d at 148 & fn. 5 (discussing court's use of background principles to analyze Petitioner's takings claim). In properly identifying South Carolina's public trust doctrine – a settled, longstanding common law restriction – as a background principle that barred Petitioner's taking claim, the South Carolina Supreme Court resolved the case on a simpler and more straightforward basis.

III. THE SOUTH CAROLINA SUPREME COURT'S OPINION DOES NOT CONTRADICT *LUCAS* OR *PALAZZOLO*.

The South Carolina Supreme Court decision is consistent with this Court's decisions in *Lucas* and *Palazzolo*. In *Lucas*, 505 U.S. at 1027-29, this Court held that compensation is not required, even in a total taking case, where a background principle of state law controls use of the property.[8] Under the "objectively reasonable criteria" for

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[7] In its first decision, the South Carolina Supreme Court had stated that "[t]his pre-existing permit requirement is relevant to respondent's investment-backed expectations." *McQueen*, 530 S.E.2d at 634.

[8] In terms of the nature of the land at issue, *Lucas* is very different factually from the instant case. *Lucas* involved dry uplands, not lands submerged by tidal waters. Unlike tidelands, uplands are not covered by the traditional South Carolina public trust doctrine. Moreover, there was no question about Lucas' ownership interest in the property as there is in this case.

identifying background principles set forth in *Lucas*, the South Carolina Supreme Court properly construed the public trust doctrine, a longstanding common law doctrine, as a background principle of state law that prevents Petitioner from filling tidal wetlands in the circumstances of this case. *See Lucas*, 505 U.S. at 1030-31. Thus, Petitioner has not demonstrated a compelling reason, under Supreme Court Rule 10(c), why the Court should hear this matter.

As in many states, the public trust doctrine in South Carolina is a common law doctrine providing that lands submerged at high tide are held subject to a trust for the public. *State v. Pacific Guano Co.*, 22 S.C. 50 (1884); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132, 144 (S.C. 1950), *overruled on other grounds, McCall v. Batson*, 329 S.E.2d 741 (S.C. 1985). Over the past century, the South Carolina courts have consistently applied this doctrine to preserve protected public interests in waterways and other tidelands. *See Cape Romain Land and Improvement Co. v. Georgia-Carolina Canning Co.*, 146 S.E. 434, 437 (S.C. 1928) (the state is responsible for protecting waters for navigation and fishery); *Port Royal Mining Co. v. Hagood*, 9 S.E. 686, 689 (S.C. 1889) (emphasizing the state's right to control land below the high water mark for the public benefit); *Sierra Club v. Kiawah Resort Assocs.*, 456 S.E.2d 397, 402 (S.C. 1995) (the public trust doctrine extends to protection of the state's waters for marine life, water quality, and public access). The public trust doctrine is even reflected in those sections of the South Carolina Constitution that compel the state to protect its waterways. *See* S.C. Const. Art. XIV §§1-4. This Court has historically recognized the importance of the

several states' sovereignty over their waterways. *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845).

The South Carolina Supreme Court properly concluded that the public trust doctrine qualified as an "objectively reasonable" background principle under *Lucas* in the circumstances of this case. *See Lucas*, 505 U.S. at 1030-31. The court noted that the state cannot permit activity that would "substantially impair[] the public interest in marine life, water quality, or public access," *McQueen*, 580 S.E.2d at 120, and that "[t]he proposed backfill would permanently destroy the critical area environment on [Petitioner's] lots." *Id.* at 118. The court also took note of Petitioner's neglect of his property, in contrast to the care taken by his neighbors. *Id.* These references to the impacts and timing of Petitioner's planned activities reflect a consideration of both "the degree of harm" posed by, and the "social value of," such activities. *See Lucas*, 505 U.S. at 1030-31 (listing criteria for identifying a background principle); *see also Palazzolo*, 533 U.S. at 630 (emphasizing "the degree of harm to public lands and resources" as one of the objective factors set forth in *Lucas*).

The South Carolina Supreme Court decision is also consistent with this Court's holding in *Palazzolo*. Under *Palazzolo*, "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Id.* The South Carolina Supreme Court holding conforms to this stricture. In identifying the public trust doctrine as a background principle of state law, the state court adhered to a longstanding interpretation of this common law principle. As noted above, the state has always held lands below the high water mark in trust for the public. *See infra* pp. 14-15. The public trust doctrine applies equally

to Petitioner's land and to his neighbors' land. It is Petitioner's own neglect that caused the land to become submerged tidelands, thereby bringing the public trust doctrine into play.[9]

Tellingly, Petitioner does not even attempt to argue that granting this petition could be justified by a split among the lower federal and state courts on this issue. *Cf.* Supreme Court Rule 10(b). This implicit concession is fully justified because, in fact, the relatively few cases that address whether the traditional public trust in tidelands can serve as a background principle barring a taking claim in appropriate circumstances have ruled that it can. *See, e.g., National Ass'n of Home Builders of U.S. v. State of New Jersey Dept. of Envtl. Prot.*, 64 F. Supp. 2d 354 (D. N.J. 1999); *Coastal Petroleum v. Chiles*, 701 So. 2d 619 (Fla. Dist. Ct. App. 1997). Moreover, just three months ago, this Court denied a petition for *certiorari* asking it to decide whether the U.S. Court of Appeals for the Ninth Circuit erred in invoking the state of Washington's public trust doctrine to bar a regulatory taking claim. *See Esplanade Props., LLC v. City of Seattle, Washington*, 123 S. Ct. 2574 (2003).

Significantly, although the public trust doctrine clearly is a valid principle of state law under *Lucas* and *Palazzolo*, it was not the only basis for the court's decision to deny Petitioner's takings claim. While affirming the state's responsibility to hold submerged lands in trust for

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[9] This Court in *Palazzolo* did not specifically address a public trust defense; although the state raised a public trust defense, the Rhode Island Supreme Court did not reach it.

the public, the South Carolina Supreme Court also stated that the state holds presumptive title to such lands in its own right. *See McQueen*, 580 S.E.2d at 119-20; *see also Coburg Dairy,* 458 S.E.2d at 548 (the state holds title to submerged lands, including those gained through the encroachment of tidal waters); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475-76 (1988) (reaffirming case law that states own "all lands under waters subject to the ebb and flow of the tide"). This alternative ground of the South Carolina Supreme Court's decision does not even implicate *Palazzolo* or *Lucas*, for it suggests that, even if the public trust doctrine were not recognized in South Carolina, Petitioner's claim still would have failed. If, following the extensive erosion in this area, the state, and not Petitioner, owns the property, then a taking claim, on any other conceivable theory, would fail. In any event, the South Carolina Supreme Court's use of the public trust doctrine fully comports with the definitions of background principles outlined in those cases, and does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of *certiorari*.

Respectfully submitted,

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No. 03-159

IN THE

Supreme Court of the United States

SAM B. MCQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT *(formerly known as* SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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INTRODUCTION

This case presents the rare spectacle of a state agency openly disavowing the fundamental obligation to obey federal law. Despite the Fifth Amendment, the Department claims for the State of South Carolina the unfettered power to take private property for public use without compensation, insofar as tidelands are concerned. The question presented here holds national importance, as evinced by the geographically diverse *amici* that have submitted briefs urging this Court to grant review.[1] Yet the Department regards this case as a matter of state law outside this Court's purview. The Department thus expects this Court to ignore the significance of this case for federal law, as well as the conflicts with this Court's decisions engendered by the decision below. But a decision with such troubling and far-reaching implications should not be permitted to stand unreviewed.

ARGUMENT

1. For the first time in this case, the Department launches a surprise attack on the owner's estate by claiming that "title to these lands passed to the state entirely" due to "longstanding common law principles that give the state a *jus privatum* interest in submerged coastal lands."[2] Br. Opp. 1, 9. In casting doubt on

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[1] *See* Brief of *Amici Curiae* Anthony Palazzolo, New England Legal Foundation, The American Farm Bureau Federation, and The South Carolina Farm Bureau Federation in Support of Petitioner; Brief *Amicus Curiae* of Pacific Legal Foundation in Support of Sam B. McQueen.

[2] The Department variously describes petitioner's lots as "regularly inundated by the tides" and as "submerged lands" situated "along the South Carolina coast." Br. Opp. 1, 7, i. However, both parcels sit some distance from the coast in the middle of a fully developed neighborhood, as the Department's own statements confirm. *See id.* at 3 (describing the land as "originally created by fill and located on saltwater canals"); R. 18 (stating in the Department's Final Administrative Order that "[m]ost, if not all, of the other lots on

(continued...)

"whether Petitioner even retains an ownership interest in his property," the Department evidently aims to show that "the state, and not Petitioner, owns the property" so that "a taking claim, on any other conceivable theory, would fail." *Id.* at 9–10 n.4, 17. To support this unprecedented theory of automatic title transfer, the Department turns to a single sentence in the decision below: "Historically, the State holds presumptive title to land below the high water mark."[3] Pet. App. 5a.

But this transparent attempt to reframe the record actually supports review. Apart from its incorrectness

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48th and 53rd Avenues are improved and contain some type of bulkhead or retaining wall"). The court below did affirm that the lots fit the statutory definition of a tideland, Pet. App. 2a & n.4, in part because *portions* of them are "periodically inundated by saline waters" from adjacent "artificial water courses." S.C. Code § 48-39-10(G); *accord* R. 21 (citing § 48-39-10(G) in the Final Administrative Order). But this tidal flow, perpetuated by the Department's permit denials, does not render the land "submerged" as a matter of law. Under South Carolina law the term "submerged lands" includes only "the area below the usual low water mark," *State* v. *Hardee*, 193 S.E.2d 497, 497–98 (S.C. 1972), and the record lacks any finding that the owner's land comes within this definition. In any event, such factual errors or misstatements are irrelevant to his constitutional claim because "overbroad regulation of even completely submerged property may constitute a taking." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 n.4 (1985).

[3] Neither the language nor structure of the opinion below supports the Department's assertion that the presumption of title forms an "alternative ground" of decision. Br. Opp. 17. The court nowhere mentions the Department's theory that the owner lost legal title by force of a presumption. And the sentence on which the Department relies is in a paragraph immediately beneath the heading, "Public Trust Doctrine." Pet. App. 5a. As the petition correctly states, "[t]he decision below represents a final judgment that rests on a single ground of decision under federal constitutional law." Pet. 22.

under state law,[4] the Department's theory directly conflicts with this Court's decisions holding that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980) (unanimous).[5] Put more tersely, "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

2. The Department counters that "[t]he decision below rests on state principles . . . that do not involve a federal legal issue." Br. Opp. 6. Invoking "the state's traditional sovereign powers over tidelands within its own borders," the Department also asserts that that decision involved only "the state's application of its property laws." *Id.* at 2, 9. The Department takes the position, then, that "[b]oth the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (including the application of background principles) are questions of state law." *Id.* at 8.

Not so. No legal alchemy can transform the owner's claim into a question of state law. To be sure, "the existence of a property interest is determined by reference

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[4] South Carolina law provides that the state's presumptive title to tidelands may be rebutted based on proof that the state intended to grant land below the high water mark. *See, e.g.*, *Hobonny Club, Inc.* v. *McEachern*, 252 S.E.2d 133, 137 (S.C. 1979) (holding that "it was the clear intent of the grants in question to convey title to all tidelands . . . and that the State of South Carolina has no valid claim of title to said property"); *Lane* v. *McEachern*, 162 S.E.2d 174, 175–76 (S.C. 1968) (holding that a private owner held good title to tidelands).

[5] If the Department is correct in its reading of the decision below, the owner has a serious claim, quite apart from his takings claim, that applying an irrebuttable presumption to strip him of legal title to land has deprived him of property without due process of law within the meaning of the Fourteenth Amendment. *See, e.g.*, *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993).

to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). But a background principle of law must be "defined by federal law" because it acts as a complete defense to a federal takings claim. *Howlett* v. *Rose*, 496 U.S. 356, 375 (1990). Otherwise, a state could circumvent the Takings Clause "by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes* v. *Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring). That a state might engage in such abuse presumably explains why this Court has "stress[ed] that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1032 n.18 (1992).

3. Not content to achieve the uncompensated conversion of the owner's property into "public lands," Br. Opp. 9, the Department insists that this drastic infringement of constitutional rights is shielded from this Court's jurisdiction. In this vein, the Department argues that the application of the background principles defense lies "within the state's purview" and that "this Court should have no real interest in the state's resolution of this question under its own laws." *Id.* (citations omitted). An inapposite rule—"the resolution by the highest court in a state of a matter of state law is not appropriate for federal review," Br. Opp. 8—cannot redeem an argument so at odds with the axioms of our constitutional republic.

South Carolina courts are bound to respect the owner's federal constitutional right to compensation, no less than if that right had been enacted by the South Carolina General Assembly. *See Claflin* v. *Houseman*, 93

U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."). By claiming for the State of South Carolina the unreviewable power to take private property without compensation, the Department has not removed the conflicts between the decision below and the decisions of this Court—it has deepened them.

4. As the petition explains in detail, the decision below squarely conflicts with this Court's decisions in *Lucas* and *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001). Pet. 12–20. If anyone ought to recover compensation under *Lucas*, surely it is Mr. McQueen, who has persuaded every court to have adjudicated his case that he has suffered a total taking. *See* Pet. App. 4a, 12a, 34a, 53a. Notwithstanding the owner's loss, the South Carolina Supreme Court denied compensation based on the "conclusory assertion," *Lucas*, 505 U.S. at 1031, that "[t]he tidelands included on McQueen's lots are public trust property subject to control of the State." Pet. App. 7a. The Department's insulting suggestion that "it is Petitioner's own neglect of his property that brought about the limitations on, if not the complete transfer to the public of, his former property interests," Br. Opp. 10, flatly contradicts this Court's teaching that a state may not "put an expiration date on the Takings Clause." *Palazzolo*, 533 U.S. at 627.

Despite these manifest conflicts with *Lucas* and *Palazzolo*, the Department insists that "the South Carolina Supreme Court properly construed the public trust doctrine, a longstanding common law doctrine, as a background principle of state law that prevents Petitioner from filling tidal wetlands in the circumstances of this case." Br. Opp. 14. While paying lip service to the "'objectively reasonable criteria' for identifying background principles set forth in *Lucas*," *id.* at 13–14, the Department fails to show how the South Carolina

court cited and applied those criteria.[6] Instead, the Department cites state law authorities, *id.* at 13–15, and invokes the "several states' sovereignty over their waterways." *Id.* at 14–15. At bottom, the Department maintains that "[b]oth the scope of the state's public trust doctrine, and the nature of a landowner's underlying property interest for the purpose of a takings analysis (*including the application of background principles*) are questions of state law." *Id.* at 8 (emphasis added). Such disregard for the limits placed by this Court on the background principles defense sharpens the conflicts between the decision below and this Court's decisions holding that "the government does not have unlimited power to redefine property rights," *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982).

5. The decision below also conflicts with the GVR Order previously issued by the Court in this case. *See* Pet. 9–12. Contrary to the assertion that this Court's remand order left the lower court "free to look to alternative facts and theories," Br. Opp. 12, such an order from this Court is exactly what it purports to be—an order, not a suggestion. *Henry* v. *City of Rock Hill*, 376 U.S. 776, 777 (1964) (per curiam); *Yates* v. *Aiken*, 484 U.S. 211, 214 (1988) (unanimous). The gist of a GVR order is the requirement that a lower court reconsider its now vacated judgment in light of the intervening decision or development identified in the order. *See* Pet. 9–10.[7] But

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[6] The Department does claim that the court applied the objective criteria of a background principle of law, without bothering to say so, when it noted the environmental harms that would allegedly arise from allowing petitioner to build on his land and petitioner's supposed "neglect" in not seeking permits earlier. Br. Opp. 15. But this effort calls to mind shoehorns, bootstraps, and Procrustean beds.

[7] Decisions cited by the Department offer little support for its view that the South Carolina Supreme Court was not required by the GVR Order to reconsider its original decision in light of *Palazzolo*. Br. Opp. 12. *Lockheed Martin Corp.* v. *Space Sys./Loral, Inc.*, 324

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that is precisely what the Supreme Court of South Carolina failed to do. Thus the lower court disobeyed this Court's mandate. *See id.* at 10–11.

6. In addition to the multiple conflicts between the decision below and the decisions of this Court, review is also warranted because the question presented is undoubtedly an important question of federal constitutional law.[8] Not only is the decision below of doubtful constitutionality, but it has the effect of nullifying *Lucas* in South Carolina, at least in cases involving tidelands. Pet. 17. If such a result were permitted to stand in a case involving the same state and agency that gave rise to *Lucas* in the first place, other courts could be expected to follow South Carolina's lead. If the potential removal of a landmark of regulatory takings law[9] were not sufficiently serious by itself to merit

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F.3d 1308, 1310 (Fed. Cir. 2003) presents an intracircuit split with *Hughes Aircraft Co.* v. *United States*, 140 F.3d 1470, 1474 (Fed. Cir. 1998), as does *Moore* v. *Zant*, 885 F.2d 1497, 1503 (11th Cir. 1989) with *United States* v. *M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992). In addition, *Moore* may be best explained as a special case where exceptional flexibility in responding to a GVR is justified because the case involved a habeas petition. *Kotler* v. *Am. Tobacco Co.*, 981 F.2d 7, 13 (1st Cir. 1992). *Kotler* confirms, however, that "the accepted norm" is for courts to restrict themselves to "the scope of [this] Court's remand order." *Id.* at 13.

[8] The Department quibbles that the petition does not allege a conflict among the lower courts. Br. Opp. 16. However, members of this Court have acknowledged that "the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict." *Parking Assoc. of Georgia, Inc.* v. *City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas & O'Connor, J.J., dissenting from denial of certiorari). Tellingly, *Lucas* itself mentions no such conflict. *See* 505 U.S. at 1010.

[9] Only last Term, every member of this Court acknowledged that the categorical rule of *Lucas* applies when an owner suffers a total

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this Court's intervention, the decision below also has the practical effect of casting a cloud on the title of some 374,234 acres of privately owned wetlands in South Carolina. Pet. 21 & n.14.[10]

CONCLUSION

The petition should be granted and the judgment below reversed.

Respectfully submitted,

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taking. *See Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 122 S. Ct. 1465, 1483 (2002); *id.* at 1490 (Rehnquist, C.J., dissenting).

[10] Far from being "pure speculation," Br. Opp. 11 n.5, this figure solidly relies on estimates published by the U.S. Fish & Wildlife Service. *See* Pet. 21 & n.14. As for the Department's pettifoggery regarding the use of estimates beyond coastal wetlands, its complaint would be better directed to the South Carolina Supreme Court whose holding extends to all "land below the high water mark," Pet. App. 6a, regardless of its proximity to the coast.

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Supreme Court of the United States

SAM B. McQUEEN,

Petitioner,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, OFFICE OF OCEAN AND COASTAL RESOURCES MANAGEMENT (FORMERLY KNOWN AS SOUTH CAROLINA COASTAL COUNCIL),

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF SAM B. McQUEEN

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QUESTION PRESENTED

Does the "Background Principles" inquiry into the nature of a Takings plaintiff's property interest allow a State to avoid the regulatory takings analysis prescribed by this Court and establish a per se exemption from the duty to pay just compensation whenever the regulated property is subject to the state's public trust doctrine?

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INTEREST OF AMICUS CURIAE

Pursuant to this Court's Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Sam B. McQueen.[1]

For more than 30 years, Amicus Curiae Pacific Legal Foundation has been litigating in support of the rights of individuals to make reasonable use of their private property. Indeed, PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by the Court in the last two decades. PLF participated as amicus in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), a case which declared, in part, that courts should engage in an objective and factually-intensive "background principles" inquiry into property interests when the government claims that it is not required to pay compensation for a total regulatory taking.

PLF believes that its litigation experience and public policy perspective will provide an additional viewpoint on the issues presented in this case. PLF specifically argues that the Court should grant certiorari in this case because it raises an important and controversial constitutional question regarding whether a state may identify the public trust doctrine as a

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

"background principle" of property law that, without further inquiry, absolves the state of its duty to compensate for a regulatory taking.

INTRODUCTION

In this case, the South Carolina Coastal Council (Council) refused to allow Sam B. McQueen (McQueen) to construct bulkheads to prevent the destruction of two parcels of land which he has held in private ownership since the early 1960's. Ultimately, McQueen wanted the bulkheads so he would be able to build a home. *See McQueen v. South Carolina Coastal Council*, 496 S.E.2d 643, 645 (S.C. Ct. App. 1998). The Council wanted no bulkheads so it could preserve the environmental benefits that it believes flow from the continuing inundation of McQueen's land. *Id.* Because the Council's actions prevented all economically viable use of his property, McQueen sued under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), alleging that the Council had effected an unconstitutional taking of private property without just compensation.

The South Carolina Court of Appeals agreed that the Council's actions had caused a taking by preventing all economically beneficial use of McQueen's property and that this result could not be justified as a manifestation of a preexisting title limitation. *McQueen*, 496 S.E.2d at 649. But in 2000, the state supreme court reversed, holding that there was no taking because McQueen was on notice of changes in the regulatory environment that rendered him without any reasonable investment-backed expectation of maintaining the physical integrity of his property. *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000). On petition for certiorari, this Court remanded *McQueen* back to the South Carolina Supreme Court for reconsideration in light of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), a decision

which foreclosed the "notice rule" as a bar to a takings claim. *Id.* at 626-30.

On remand from this Court, the South Carolina Supreme Court affirmed its previous decision of no taking, but on entirely new grounds. While accepting as uncontested the finding that McQueen had been deprived of all economically beneficial use, the court concluded that no compensation was due because a background principle of property law—the public trust doctrine—stripped McQueen of any right to compensation. The court did not consider the nature of the land use proscribed, the nature of the land use typical to McQueen's neighborhood, McQueen's expectations, or the extent to which the public trust doctrine has traditionally permitted certain private uses of land. In short, the court failed to consider whether McQueen had lost any private property interest before concluding that he had no right to compensation.

This Court should not mistake this case for a dispute over whether the South Carolina Supreme Court wrongly applied the state's public trust doctrine. This case is about a state court that has converted what is properly an analysis into whether government regulation has taken any private property interest—the "background principles" inquiry—into a vehicle for creating a new per se takings exception that provides a blanket escape from the Fifth Amendment command that governments compensate for depriving a landowner of all economically beneficial use of property.

ARGUMENT

I

WHETHER A STATE MAY APPLY THE "BACKGROUND PRINCIPLES" INQUIRY TO CREATE A CATEGORICAL EXEMPTION FROM THE DUTY TO PAY JUST COMPENSATION IS AN IMPORTANT QUESTION OF LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT AND WHICH THIS COURT MUST ADDRESS TO ENSURE A FEDERAL RIGHT TO JUST COMPENSATION

In *Lucas*, this Court held that South Carolina could not avoid compensating for a deprivation of all economically beneficial use of land because the deprivation was intended to prevent a land use "harmful" to the public interest. *Lucas*, 505 U.S. at 1026. The Court explained that there was *no* escape from the duty to compensate when a private property owner is deprived of all economically beneficial use of land. Compensation is unnecessary only when "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id* at 1027. That is, compensation is not constitutionally required when it is shown that government's regulatory actions did not harm a private use interest, but instead simply reinforced "preexisting limitations" on the claimant's title. *Id*. at 1028-29.

This Court has suggested that some title limitations might be found in "the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029. In this case, the court below transformed this "background principles" inquiry from an individualized inquiry into the nature of a landowner's title into a vehicle for creating a per se exception to takings liability. It has specifically concluded that the public trust doctrine, which grants the state a limited right to control lands and waters

influenced by the tides, operates as such an exception when found to encumber private property, without further inquiry. Because this construction conflicts with this Court's characterization of the "background principles" inquiry, the decisions of other lower courts, and threatens to erase "limits to the noncompensable exercise of the police power," *Lucas*, *Id.* at 1026, this Court should grant the petition for certiorari.

A. The Decision Below Establishes a Per Se Public Trust Exception Incompatible with the Decisions of This Court and the Decisions of Lower Courts

1. The Lower Court's Identification of a "Background Principles" Exception Distorts This Court's Jurisprudence

In *Lucas*, this Court outlined the scope of the "background principles" inquiry into the nature of a landowner's private (and thus compensable) use interests. It specifically noted that the inquiry will "ordinarily entail . . . analysis of" (1) "the degree of harm to public lands and resources, or adjacent private property posed by the claimant's proposed activities"; (2) "the social value of the claimant's activities and their suitability to the locality in question"; and (3) "the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." *Lucas*, 505 U.S. at 1030-31. In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Court affirmed this framework, explaining that "[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as *the nature of the land use* proscribed." *Id.* at 630 (emphasis added).

Moreover, in both *Lucas* and *Palazzolo*, the Court pointed to a rule of thumb that highlighted the need to fairly and equally apply the "background principles" exception. Specifically, a proscribed use of land will not normally implicate preexisting "background principles" restrictions unless that use of land has

been traditionally and consistently denied to similarly situated landowners. *Lucas*, 505 U.S. 1031 ("The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law [background principles] prohibition . . . . So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant."); *Palazzolo*, 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others.").

In concluding that the public trust doctrine permitted the state to deprive McQueen of all economically beneficial use of his land without just compensation, the court below radically departed from this Court's "background principles" framework. Absent from the lower court's analysis is any serious consideration of the fact that the land use denied to McQueen —placement of bulkheads for residential improvements—has been, and continues to be, engaged in by almost all landowners in McQueen's neighborhood. *See McQueen*, 496 S.E.2d at 599 ("McQueen's lots are among the few in the immediate vicinity which do not have bulkheads; his neighbors continue to use the existing retaining devices located on their properties and permanent dwellings have been constructed on most of the surrounding lots."). Nor is there consideration and discussion of the extent to which the public trust doctrine has coexisted with such private land use. Finally, there is no showing that improvement of land like McQueen's has been viewed as so inappropriate, so harmful, and the harm so inhospitable to mitigation, that no one in McQueen's circumstances has ever had a right to engage in such a use. For the lower court, the mere presence of tidewaters is, under the "background principle" of the public trust doctrine, enough to absolve the state of the duty to compensate for depriving McQueen of all economically beneficial use of property.

The court below has thus used the "background principles" inquiry into property interests to establish a per se public trust doctrine exception to takings liability. This is as unwarranted by general regulatory takings principles as it is by this Court's articulation of the "background principles" inquiry. This Court has, after all, declared that regulatory takings analysis is typically an "ad hoc factual inquir[y]," *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), grounded in the fundamental principles of "fairness and justice." *Tahoe-Sierra*, 535 U.S. at 332; *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). ("Courts . . . must attend to those circumstances which are probative of what fairness requires in a given case."). Moreover, "[a]n important indicium of fairness," *id.* at 635, can normally be found in the determination of whether a landowner has reasonable expectations of using his land, given the "the nature and extent of permitted development . . . vis-a-vis the development sought by the claimant." *Id.* at 634.[2] Given these principles, lower courts are to avoid the "temptation to adopt what amount to *per se* rules in *either direction*." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321 (2002) (emphasis added).

South Carolina has unilaterally freed itself from these constitutional standards by creating a per se public trust exception under the rubric of the "background principles"

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[2] *Cf. Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 485 (1988). (O'Connor, Stevens, and Scalia, JJ., dissenting) (arguing against affirmation of a state decision extending the public trust to private land without compensation because it will surely "disrupt the settled expectations of landowners"). It is especially difficult to understand the lower court's failure to consider McQueen's expectations since the court was directed to reconsider *McQueen* in light of *Palazzolo*, a decision that contains considerable discussion of the relevance of landowner expectations. *See Palazzolo*, 533 U.S. at 626-30; *id.* at 632-36 (O'Connor, J., concurring).

inquiry. The Court should grant the Petition for Writ of Certiorari to reaffirm the "background principles" concept as a vehicle for fairly identifying property interests, not for creating broad exceptions to takings liability.

2. The Lower Court's Decision Deepens a Conflict Concerning the Impact of the Public Trust Doctrine on the Right to Compensation

While the Ninth Circuit Court of Appeals appears to agree with the South Carolina Supreme Court that the public trust doctrine supplies an automatic "background principles" exception to the duty to compensate, *see*, *e.g.*, *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002), other courts have adopted a more careful approach in keeping with this Court's jurisprudence. For instance, in *Orion Corp. v. State of Washington*, 747 P.2d 1062 (Wash. 1987), the Washington Supreme Court rejected an argument that "the public trust doctrine precludes Orion's takings claim in its entirety." Foreshadowing the "background principles" framework articulated in *Lucas*, the court concluded that the public trust's impact on the right to compensation could only be determined after an analysis of "whether Orion's property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use." 747 P.2d at 1073.

Similarly, in *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Federal Circuit Court of Appeals refused to allow the government to claim a navigational servitude, the federal expression of the public trust doctrine, as a per se "background principles" exception. *Id.* at 1385. To avoid a taking, the government was required to show that its land use restrictions were specifically designed to enforce the government's preexisting property rights, rather than to limit the claimants' rights: "If . . . the Government cannot demonstrate that it denied the permit on navigational

grounds, then its defense under the navigational servitude fails." *Id.* at 1386.

The decision below articulates an understanding of the public trust doctrine and the "background principles" inquiry that is in direct conflict with the understanding of *Orion* and *Palm Beach Isles*. Unlike the *Orion* court, the lower court has implicitly determined that principles of the public trust doctrine preclude a "takings claim in its entirety." No analysis of whether the "property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use," 747 P.2d at 1073, is necessary in South Carolina before the presence of the public trust absolves the state of the duty to compensate for a regulatory taking.

Unlike *Palm Beach Isles*, the decision below allows the government to avoid compensating for draconian regulatory actions without showing that such actions were designed to enforce "background principles" restrictions emanating from the public trust doctrine. Thus, the government may rely on the public trust as a post hoc justification for depriving a landowner of all economically beneficial use of property without just compensation. The Court should grant the petition to reconcile the important conflicts between the decision below and the decisions of other lower courts on the role of "background principles" restrictions, including the public trust doctrine, in limiting a right to compensation.

B. The Court Must Police the "Background Principles" Inquiry to Ensure That the Right to Just Compensation Does Not Wither in the States

Absent meaningful oversight by this Court, the "background principles" inquiry threatens to eviscerate the federal right to just compensation in South Carolina and other states. This threat arises mainly from the courts' tendency to view the inquiry as a vehicle for identifying "exceptions" to takings liability rather than for identifying property interests.

See McQueen v. South Carolina Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (characterizing the "background principles" issue as whether "background principles of South Carolina property law *absolve* the State from compensating McQueen.") (emphasis added). Compounding the threat is the fact that "background principles" may arise from the general "law of property," as well as from the more clearly understood law of nuisance. *See Lucas*, 505 U.S. at 1029. Together, these "background principles" traits invite states to identify a wide variety of land use restrictions as takings exceptions, and thus escape "limits to the noncompensable exercise of the police power." *Id.* at 1026. *See, e.g., Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994) (state law prohibition on development of lands containing native American burial grounds held to be a background principle defeating a compensation claim); *Machipongo Land and Coal Co., Inc. v. Commonwealth.* 799 A.2d 751 (Pa. 2002). (In light of changing notions of nuisance law, regulatory prohibition on mining in traditional mining area constituted exception to duty to compensate.); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (discovering customary background principle that allows state to take landowner's right to exclude without just compensation).

The potential for avoiding federal takings liability under "background principles" "exceptions" recreates the situation that prevailed on the eve of *Lucas*. Then, the South Carolina Supreme Court advanced an expansive understanding of a "police power" exception which allowed the states to deny compensation for land use regulation whenever the goal was to stop a "public harm." *Lucas*, 505 U.S. at 1020-26. This Court rejected this understanding precisely because it was so broad and malleable that it threatened to swallow the federal right to just compensation completely. *Id.* at 1026. By signaling a similar willingness to review misapplications of the "background principles" inquiry, this Court can contain the

danger those misapplications present to constitutionally-protected property rights. *See generally*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)Use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 375-79 (2002) (arguing that Supreme Court jurisprudence hinders the expansive application of the public trust doctrine to deny property rights).

Yet, so far this Court has avoided "background principles" disputes, perhaps because they may appear to implicate questions of state law, rather than federal constitutional rights. This case presents the federal takings issue arising from the public trust doctrine more cleanly than the rejected cases. The central issue here is the propriety of the lower court's recognition of the public trust doctrine as a per se "background principles" exception to the normal, factually-intensive, takings inquiry and ultimately, to the duty to compensate for total takings; it is not the propriety of the court's application of the state's public trust doctrine to McQueen's property.

To abdicate control of the "background principles" inquiry to the states under these circumstances risks returning to them the ability to "nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power." *Lucas*, 505 U.S. at 1026. This Court denied such an ability over a decade ago when dressed up in the garb of "noxious use;" there is no reason to accede to it when dressed up in the garb of "background principle," whether state-law oriented or not. Indeed, it makes no sense to deprive the states of a vague, but federally reviewable "police power" takings exception only to give them a "background principles" concept that justifies new exceptions escaping this Court's review simply because they are said to arise from specific state rules.

The recent stream of cert petitions raising questions about the role of the public trust doctrine in regulatory takings law

demonstrates that this issue has percolated long enough in the lower courts. The lower court's adoption of a categorical public trust doctrine exception to a total regulatory taking presents the issue starkly and cleanly. Consequently, this case offers a perfect opportunity for this Court to give guidance on the important public trust doctrine takings question. More specifically, it presents an opportunity to remind the states that, when it comes to regulatory takings analysis, the general rule against adopting per se standards applies when the standard arises from the government's position, as well as when it is advanced by the landowner. *Tahoe-Sierra*, 535 U.S. at 321 (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

DATED: August, 2003.

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No. 03 -0159

In the
Supreme Court of the United States
October Term, 2003

SAM B. MCQUEEN,
Petitioner,
v.
SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, OFFICE OF OCEAN & COASTAL RESOURCE MANAGEMENT (*f/k/a* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of *Certiorari* to the Supreme Court of South Carolina

---

BRIEF OF *AMICI CURIÆ* ANTHONY PALAZZOLO, NEW ENGLAND LEGAL FOUNDATION, THE AMERICAN FARM BUREAU FEDERATION, AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

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28 pp

QUESTIONS PRESENTED

Amici Curiæ Anthony Palazzolo, the American Farm Bureau, and the South Carolina Farm Bureau adopt the question presented by Petitioner Sam B. McQueen:

> Whether a court may deny compensation for a categorical taking by invoking a new and expansive conception of the public trust doctrine, thereby disregarding the limits placed by this Court's regulatory takings decisions on the definition of a background principle of law.

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No. 03 -0159

In the
Supreme Court of the United States
October Term, 2003

SAM B. MCQUEEN,
Petitioner,
v.
SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, OFFICE OF OCEAN & COASTAL RESOURCE MANAGEMENT (*f/k/a* SOUTH CAROLINA COASTAL COUNCIL),
Respondent.

On Petition for Writ of *Certiorari* to the Supreme Court of South Carolina

---

BRIEF OF *AMICI CURIÆ* ANTHONY PALAZZOLO, NEW ENGLAND LEGAL FOUNDATION, THE AMERICAN FARM BUREAU FEDERATION, AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*[1]

Amici seek to bring to the Court's attention their views, and the views of the supporters the Association *Amici*—New England Legal Foundation ("NELF"), the American Farm Bureau Federation ("AFBF"), and the

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amici* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amici* are filing this brief pursuant to a blanket consent of counsel for Petitioner and Respondent filed with this Court on August 28, 2003.

South Carolina Farm Bureau Federation ("SCFBF")—concerning the effect of the public trust doctrine as a background principle of state law on the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ Anthony Palazzolo ("Palazzolo") owns approximately 18 acres of wetland property, subdivided into 74 building lots, in Westerly, Rhode Island. Rhode Island state coastal wetlands regulations similar to those at issue in this case have severely restricted Mr. Palazzolo's use of his property. Mr. Palazzolo challenged these Rhode Island wetlands regulations as a regulatory taking in litigation that reached this Court in *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001). This Court determined that the so-called "notice rule" should not bar Mr. Palazzolo's regulatory taking claim and remanded Mr. Palazzolo's case to the Rhode Island Supreme Court for further proceedings to address the merits of his claims under *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978). 533 U.S. at 627–28, 630, 632. Shortly thereafter, this Court granted the initial petition for *certiorari* by Petitioner Sam B. McQueen ("McQueen") and remanded this case to the Supreme Court of South Carolina for further consideration in light of *Palazzolo. McQueen v. South Carolina Department of Health & Envtl. Control,* 533 U.S. 943 (2001), *vacating McQueen v. South Carolina Coastal Council,* 340 S.C. 65, 530 S.E.2d 628 (2000) ("*McQueen I*") (barring McQueen's regulatory takings claim on basis of notice rule).

Just as the South Carolina Supreme Court did in this case, on remand in Mr. Palazzolo's case the Rhode Island Supreme Court ordered the parties to address the applicability of the public trust doctrine to the wetlands at issue, *Palazzolo v. State ex rel. Tavares,* 785 A.2d 561 (R.I. 2001). The Rhode Island Supreme Court in an unpublished order then further remanded Mr. Palazzolo's

case to the Rhode Island Superior Court for Washington County for re-trial. *Palazzolo v. State ex rel. Tavares*, No. 98-333-A, order (R.I. June 24, 2002).[2] The Rhode Island Supreme Court's remand order mandated that the trial court "consider . . . the effect of the Public Trust Doctrine . . . on [Mr. Palazzolo's] reasonable investment-backed expectations [under the doctrine of *Penn Central*]"; "require that a complete survey of the *Palazzolo* property be filed with the Court prior to any hearing [in order to] establish, among other elements, the portion of the *Palazzolo* marshlands that are below the high-water mark of tidal effect [the historic public trust boundary]"; and "consider the effect of the Public Trust Doctrine upon the limitations of title originally acquired by Mr. Palazzolo and his predecessor in title, Shore Gardens, Inc., in accordance with the [background] principles [of state law] enunciated in *Lucas* [*v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)]." *Id.* Mr. Palazzolo is concerned that, unless the South Carolina Supreme Court's novel public trust position is reversed, the Rhode Island state courts may similarly deny him compensation based on a re-interpretation of public trust law that he could not have foreseen when he invested in his property in 1959.

Amicus Curiæ NELF is a non-profit, public interest law firm, incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for the United States and the New England region, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF's members are affected by

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2 The Rhode Island Supreme Court's remand order is attached hereto as Appendix A.

the real estate development climate in New England, which depends, in part, upon the extent to which land-use agencies respect property owners' development expectations. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Green Tree Fin. Corp. v. Bazzle,* 123 S. Ct. 2402 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.,* 230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001). NELF has submitted briefs, as party or counsel, in several cases involving the public trust doctrine to state supreme courts. *See, e.g., Trio Algarvio, Inc. v. Department of Envtl. Protection,* 440 Mass. 94, __ N.E.2d __ (2003); *Providence & Worcester R.R. v. Pine,* 729 A.2d 202 (R.I. 1999); and *Greater Providence Chamber of Commerce v. State of Rhode Island,* 657 A.2d 1038 (R.I. 1995).

Amicus Curiæ AFBF is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, educational and social interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico representing more that 5 million member families.

Amicus Curiæ SCFBF is a voluntary non-profit membership association organized under the laws of the State of South Carolina. It has its principal offices in Columbia, South Carolina. SCFBF, individually and through joint and collective efforts, seeks to promote, protect and represent the economic, social and educational interests of farmers in South Carolina. SCFBF is composed of 47 local chapters with a total membership of more than 130,000 member families. SCFBF is a member of the AFBF.

Sam B. McQueen is a farmer member of the Horry-Conway Chapter of SCFBF. Horry-Conway Farm Bureau represents 3,801 member families.

AFBF and SCFBF farmer and rancher members own or lease significant amounts of land on which they depend for their livelihoods and on which all Americans depend for high quality, affordable food, fiber and other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government—such as the state wetlands regulation at issue in this case—AFBF and SCFBF members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause of the Fifth Amendment when regulation goes too far. AFBF and SCFBF and their members have a direct interest in the outcome of this case and, therefore, are vitally interested in the proper interpretation of the Just Compensation Clause of the Fifth Amendment to the United States Constitution. These concerns underlie AFBF's participation as an *amicus* in this Court in support of landowners in takings cases such as *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), as

well as in cases concerning the permissible scope of federal land use regulation such as *Babbit v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001).

The South Carolina Supreme Court's expansion of the circumstances in which a state may effectively dispossess an owner of his or her property without paying compensation is therefore contrary to the interests of *Amici* and the members of the Association *Amici*. *Amici Curiæ* therefore believe that this brief will provide an additional perspective to aid the Court in determining whether to grant the petition for a writ of *certiorari* of Petitioner McQueen.

SUMMARY OF ARGUMENT

The decision below in this case violates procedural standards by ignoring the mandate of this Court on remand, by basing its ruling on a defense that was not presented to the trial court, and by resting on factual assumptions not found in the record. The decision below also expands traditional South Carolina public trust doctrine beyond its traditional confines, contrary long-adhered to background principles of state law, by allowing its use for purposes other than navigation, by applying the doctrine to wetlands above the mean high tide line, and by applying the doctrine to private property inundated by a single catastrophic event, Hurricane Hugo.

ARGUMENT

I. The decision below constitutes an attempted evasion of federal law because the South Carolina Supreme Court engaged in several procedural irregularities in order to reach its result-oriented conclusion.

This case raises a matter of national concern that affects owners of wetland property throughout the country: the extent to which the federal Constitution protects property owners when states reformulate their traditional public trust doctrine to cover additional land, for additional purposes, with additional use restrictions. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (c) because the South Carolina Supreme Court has "decided an important federal question in a way that conflicts with relevant decisions of this Court," including this Court's previous remand order in this case, *McQueen v. South Carolina Department of Health & Envtl. Control,* 533 U.S. 943 (2001), and this Court's jurisprudence defining background principles of state law in *Palazzolo v. Rhode Island,* 533 U.S. 606, 630 (2001), and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992).

Since *Lucas,* states have increasingly relied on background legal principles, in particular the public trust doctrine, as defenses to regulatory takings. This case squarely addresses how much beyond long-standing precedents a state can stretch its traditional common law in order to defeat federally protected property rights by invoking "background principles of state law." The South Carolina Supreme Court's expansion of the public trust beyond its precedential moorings in this case goes too far. As this Court has instructed, "at least as to confiscatory regulations (as opposed to those regulating

the use of property), a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 167 (1998). The South Carolina Supreme Court's considerable departures from procedural and substantive precedents illustrate the degree to which it was willing to go in abrogating traditional legal principles to deprive McQueen of compensation for what the court acknowledged was "a total taking." *McQueen v. South Carolina Coastal Council,* 354 S.C. 142, 148, 580 S.E.2d 116, 119 (2003) ("*McQueen II*").

Amici contend that the South Carolina Supreme Court arrived at the decision on remand based on at least three significant procedural irregularities that alone warrant examination of the decision by this Court as an attempt to evade federal takings law. First, as discussed in detail by Petitioner, the court below ignored this Court's mandate and failed to address the effect of the *Palazzolo* decision on its earlier decision in *McQueen I, vacated and remanded sub nom. McQueen v. South Carolina Dept. of Health & Envtl. Control,* 533 U.S. 943 (2001). *See* Petition at 9–11. Most striking in this case is the South Carolina Supreme Court's rejection of compensation for McQueen on the basis of the public trust doctrine as a purported background principle of state law without reviewing the extensive discussion in *Palazzolo* of the meaning of background principles of state law. *Compare McQueen II,* 354 S.C. at 148–49, 580 S.E.2d at 119, *with Palazzolo,* 533 U.S. at 626, 629–30. *See* 18B Charles Alan Wright *et al., Federal Practice & Procedure* § 4478.3 (2003) (lower court "does violate the mandate . . . [if it] fail[s] to decide questions that the court of appeals has directed the lower court to decide").

The second significant procedural irregularity is that the public trust doctrine—the basis of the South

Carolina Supreme Court's decision on remand—was an issue newly introduced to the case, *and rejected on that ground,* when the South Carolina Supreme Court first considered McQueen's case. *McQueen I,* 340 S.C. at 70 n.2, 530 S.E.2d at 631 n.2. The administrative decisions to deny McQueen the use of his property were based on state wetlands regulations and did not take the public trust into account. *Id.*, 340 S.C. at 68, 530 S.E.2d at 630 (property located within "tidelands critical area").

At the trial level, the State did not raise the public trust as a defense to the regulatory taking and the trial court therefore did not make any factual determination about the extent of McQueen's property that was encumbered by the public trust. *See* Petition Appendix E at 41a–54a. The South Carolina Supreme Court, in its first opinion, dismissed public trust arguments made by *amici* "[b]ecause these arguments were not made to the lower courts . . . ." *McQueen I,* 340 S.C. at 70 n.2, 530 S.E.2d at 631 n.2. The South Carolina Supreme Court initially decided to deny McQueen compensation for the regulatory prohibition on using his property on the "notice rule" because McQueen did not request development permission earlier in the face of growing regulatory restrictions. *McQueen I,* 340 S.C. at 73–76, 530 S.E.2d at 633–35.

Nevertheless, on remand from this Court for consideration in light of *Palazzolo,* the South Carolina Supreme Court framed the issue as "Do background principles within South Carolina property law absolve the State from compensating McQueen?" *McQueen II,* 354 S.C. at 148, 580 S.E.2d at 119. The only background principle that the South Carolina Supreme Court considered was the public trust doctrine, *id.*, 354 S.C. at 149–50, 580 S.E.2d at 119–20, despite the court's earlier rejection of the doctrine for the State's failure to raise it below. The South Carolina Supreme Court's raising of the

public trust doctrine as a defense *ex mero motu* despite the failure of the State to raise it below flies in the face of long-standing rules of procedure. *Grant v. South Carolina Coastal Council,* 319 S.C. 348, 356, 461 S.E.2d 388, 392 (1995) (appellate court will not hear issues not raised or preserved in lower court proceeding); *Lite House, Inc. v. J.C. Roy Co.,* 309 S.C. 50, 55, 419 S.E.2d 817, 820 (Ct. App. 1992) ("Because the trial judge did not address the issue . . . and [the party raising the issue] made no motion asking him to do so . . ., we also will not address this issue."). *See* Petition at 17 n.11.

The third major procedural irregularity is that the South Carolina Supreme Court based its decision to deny McQueen compensation on the public trust doctrine without any findings of fact below that McQueen's property was subject to the public trust. On remand, the court below relied on the following statements, apparently derived from the administrative record, to find that the public trust applied to McQueen's land:

> At the time of the hearing, the majority of both lots had reverted to tidelands *or* critical area saltwater wetlands. . . . The 53rd Avenue lot is inundated regularly by tidal flow all the way up to the street. The 48th Avenue lot has less tidal flow but contains more critical area wetland vegetation.

McQueen II, 354 S.C. at 146, 580 S.E.2d at 118 (emphasis added).[3] These determinations relate to the

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3 South Carolina statute defines "tidelands" to include not only land below mean high tide, but also considerable property above mean high tide: all "coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved," regardless of the effect of the tide. S.C. St. § 48-39-10 (G). As used in current South Carolina coastal regulations, "tidal" land includes not only property subject to

administrative jurisdiction of the regulatory agency. None of these purported factual determinations relate to the critical determination for public trust purposes of the extent of inundation of McQueen's property at mean high tide. *State v. Fain,* 273 S.C. 748, 752, 259 S.E.2d 606, 608 (1979); *State v. Hardee,* 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972). In fact, quite the opposite, as it appears that the 48th Avenue lot is not significantly affected by the tide.

Not surprisingly, because the public trust was not an issue at the trial court, the extent of the public trust was not tried and did not become a part of the record and the trial court made no fact findings on the extent of the public trust. *See* Petition Appendix E at 41a–54a. Moreover, even the South Carolina Supreme Court could have done so as an equitable matter, it did not attempt to make findings from the sparse record as to the extent of McQueen's property covered at mean high tide. *See South Carolina Department of Natural Resources v. Town of McClellanville,* 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) ("[A] Master's findings, concurred with by the circuit court, will not be disturbed on appeal unless without evidentiary support."); *Satcher v. Satcher,* 351 S.C. 477, 482, 570 S.E.2d 535, 538 (Ct. App. 2002) (in a South Carolina equity action heard by a master, while appellate court may make findings of fact from the record, "we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was

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tidal inundation at mean high tide, but all adjacent wetlands that "are an integral part of the estuarine systems." S.C. Dept. of Health & Envtl. Control, R-30-1 (D) (49), available at http://www.scdhec.gov/ocrm/HTML/regs2002.html. Therefore the reference to much of the lots as "tideland" is irrelevant to determining the extent of the public trust. Similarly, the reference to the 53rd Avenue lot as "inundated regularly by tidal flow all the way up to the street" is irrelevant because regular may mean only at the twice monthly extremely high spring high tides.

in a better position to judge their credibility."); *Low Country Open Land Trust v. State,* 347 S.C. 96, 101–02, 552 S.E.2d 778, 781 (Ct. App. 2001) (determination of title in tidelands is a legal matter, appellate courts defer to master as factfinder).

McQueen had no notice that he might need to introduce evidence of the inapplicability of the public trust to his property. Had he been apprised that the State was raising a public trust defense, under South Carolina law, he could have attempted to put forward evidence that his title extended below been high water by virtue of the original grant. *See Hardee,* 259 S.C. at 539, 193 S.E.2d at 499 ("in the absence of more specific language," private title presumed to extend only to mean high tide line); *Low Country Open Land Trust,* 347 S.C. at 102–03, 552 S.E.2d at 782–83 (property owner overcame presumption to establish title below mean high tide).[4]

McQueen had no opportunity to rebut the presumptions of title to land below mean high tide and to navigability of the canal because they were not issues in the case until the South Carolina Supreme Court made them issues on remand from this Court. Until then, McQueen was in the same position as the owner of the Atlantic House, "where it was uncontested [that the property owner] was 'owner of record' of land below high water mark." *McQueen II,* 354 S.C. at 149 n.6, 580 S.E.2d at 119 n.6, *citing City of Folly Beach v. Atlantic House Properties, Inc.,* 318 S.C. 450, 458 S.E.2d 426 (1995). Nevertheless, the South Carolina Supreme Court applied

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4 It might well be that the prior owners of the subdivision in which McQueen's lots are located may have owned the entire property, including the canal beds, in fee. It may well be that the tidal canal abutting McQueen's property was not navigable in fact, which would have exempted it from the public trust under South Carolina law. *See McQueen II,* 354 S.C. at 150 n.7, 580 at 120 n.7; *Hughes v. Nelson,* 303 S.C. 102, 104, 399 S.E.2d 24, 25 (Ct. App. 1990).

the presumptions of title and navigability against McQueen on remand.

In view of the procedural irregularities in the opinion below—which ignores this Court's mandate, is based on an issue not raised below, and relies on facts not in evidence—the South Carolina Supreme Court's decision is severely flawed. It therefore well warrants review by this Court to vindicate McQueen's federally protected property rights.

II. The South Carolina Supreme Court's significant expansion of the public trust doctrine invites review because the court's novel substantive interpretation of the public trust doctrine contradicts traditional South Carolina public trust limitations.

Not only is the decision below procedurally flawed, it also effects a major change in South Carolina property law by expanding the public trust in three significant ways—ignoring the traditional limitation on the public trust of the doctrine of avulsion, expanding public trust coverage to marshland above mean high tide, and expanding permissible public trust purposes in artificial navigable streams beyond navigation. This constitutes a perversion of this Court's guidance on the meaning of background principles of state law in *Palazzolo* and *Lucas*. For the State to prohibit a proposed development as a violation of a background principle, the principle must be generally applicable, long-standing, and based on the state's common-law tradition.[5] In this case, all

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[5] "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law *by mere virtue of the passage of title*. . . . [O]ur description of the concept in *Lucas* . . . is explained in terms of those *common, shared* understandings of permissible limitations derived from a State's legal *tradition*." *Palazzolo v. Rhode Island*, 533 U.S. at 630 (emphasis added). "Any limitation so severe

three of these expansions of the public trust are major departures from historic precedents.[6]

Historically, the rapid inundation of property by tidal waters is treated as an avulsion (a sudden change in a water body's limits), meaning that property boundaries remain the same as before the change. By common law, the property owner may reclaim such inundated land. "If

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cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029 (emphasis added). The decision below, if allowed to stand, would effectively permit states to change their public trust doctrines retroactively to prohibit the use of property coveted by the government in its natural condition without compensation and without allowing a federal remedy. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (O'Connor, J., plurality opinion) (retroactive application of novel legal doctrines discouraged).

6 South Carolina could not argue that the South Carolina Supreme Court's novel expansive interpretation of the public trust doctrine was permissible as an adequate and independent state ground for decision, even if fails to meet the requirements of a background principle of state law under *Lucas* and *Palazzolo*. This Court has held on numerous occasions that a ruling that purports to rest on an adequate and independent state ground invites review when the state decision has the effect of evading a federal right. *Howlett by Howlett v. Rose*, 496 U.S. 356, 366 (1990) ("The adequacy of the state law ground to support a judgment precluding litigation of the federal claim is itself a federal question which we review de novo."). *See* 16B Charles Alan Wright *et al., Federal Practice & Procedure* § 4021 at 299, § 4029 (federal courts may "disregard . . . any state ground that has so little support in either reason or precedent as to be 'in effect' an evasion of federal law") (1996 & Supp. 2003). In this case McQueen's property rights are protected by the Due Process and Takings Clauses of the Fifth Amendment of the federal Constitution, as applied to the states by the Fourteenth Amendment. The numerous procedural irregularities and departures from precedent discussed by *Amici* suggest that the South Carolina Supreme Court in *McQueen II* was attempting to evade the recognition of McQueen's federally protected property rights.

a subject hath land adjoining the sea, and the violence of the sea swallow it up . . . if . . . it be by art or industry regained, the subject does not lose his propriety . . . though the inundation continue forty years." Matthew Hale, *De Jure Maris*, c. 4 at 381. *See id.* at c. 4 at 383; Joseph K. Angell, *Treatise on the Right of Property in Tide Waters* 76–79 (1826) ("[I]f an individual's land has been inundated, he may regain it by any work which will shut out and exclude the water.").[7] South Carolina recognizes the doctrine of avulsion, at least in regard to shifting stream beds. *Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855). Moreover, "the English common law ordinarily is presumed to govern if there is no South Carolina authority to the contrary." *State ex rel. McLeod v. Sloan Constr. Co.*, 284 S.C. 491, 496, 328 S.E.2d 84, 87 (Ct. App. 1985) (citation omitted). *See Low Country Open Land Trust v. State*, 347 S.C. at 109–10, 552 S.E.2d at 785–86.

The record on appeal ("R.") below discloses that McQueen's property suffered little erosion until Hurricane Hugo in 1989 and, during that hurricane, the property eroded significantly. R. at 117, 212–13, 335. This is a classic case for the application of the doctrine of avulsion, which would have allowed McQueen to use "art or industry" to reclaim the land lost to the hurricane, in accordance with applicable English common law and South Carolina precedents. Thus, this case is similar to *City of Folly Beach*, where a restaurant built over the ocean was destroyed by Hurricane Hugo and the owners were entitled to compensation for the taking of their

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7 Numerous South Carolina cases cite Hale and Angell as authorities on the public trust. *See, e.g., Spigener v. Cooner*, 42 S.C.L. (8 Rich.) 301 (1855); *Shands v. Triplet*, 26 S.C. Eq. (5 Rich. Eq.) 76 (1852); *Horry County v. Woodward*, 282 S. C. 366, 372–74, 318 S.E.2d 584, 587–89 (Ct. App. 1984) (quoting same portion of Hale with different omissions); *State ex rel. McLeod v. Sloan Constr. Co.*, 284 S.C. 491, 496, 328 S.E.2d 84, 86–87(Ct. App. 1985).

property by eminent domain because they had the right to rebuild. *City of Folly Beach*, 318 S.C. at 451, 458 S.E.2d at 426, *cited in McQueen II*, 354 S.C. at 149 n.6, 150 n.8, 580 S.E.2d at 119 n.6, 120 n.8. Nevertheless, the South Carolina Supreme Court in this case chose to disregard avulsion as a qualification of the public trust doctrine and its own recent precedent in *City of Folly Beach* to deny McQueen compensation.

In another departure from traditional public trust doctrine, the South Carolina Supreme Court blithely applied the public trust to property above the mean high tide line that falls within the statutory jurisdiction of the Department of Health and Environmental Control because it is wetland and therefore meets the expansive statutory definition of "tideland." *See supra* note 3. "[W]etlands created by the encroachment of navigable tidal water belong to the State." *McQueen II*, 354 S.C. at 150, 580 S.E.2d at 120.[8] This proposition, which confounds wetlands and tidelands, constitutes an unprecedented expansion of the public trust, which historically applied in South Carolina (as in most states) to coastal property only below the mean high tide line. *Hardee*, 259 S.C. at 540–41, 193 S.E.2d at 500. *See Shively v. Bowlby*, 152 U.S. 1, 26 (1894) (while public trust doctrine is unique in each state, broad outlines of public trust doctrine similar in all states). Much, if not most, coastal wetland property is above the mean high tide line. While wetlands above the mean high tide line

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8 The case cited by the South Carolina Supreme Court as precedent for expanding the public trust to all coastal wetlands, *McQueen II*, 354 S.C. at 150, 580 S.E.2d at 120, does not support the proposition. The earlier case stated: "The extended marsh created by encroachment of the waters . . . also belongs to the State." *Coburg Dairy, Inc. v. Lesser*, 318 S.C. 510, 513, 458 S.E.2d 547, 548 (1995). In the original context, however, it is clear that all the marshland referred to in *Coburg* was below the mean high tide line, unlike that in McQueen's case.

are of environmental concern and subject to reasonable land-use regulation, until now they have always been treated as private property free of the public trust.

In its third expansion of South Carolina public trust doctrine, the South Carolina Supreme Court used the public trust to prohibit development of property that has no navigational utility, despite precedents that navigation is the principal recognized public trust purpose in South Carolina. *City of Folly Beach*, 318 S.C. at 452, 458 S.E.2d at 427. *See Sierra Club v. Kiawah Resort Assocs.*, 318 S.C. 119, 127–28, 456 S.E.2d 397, 402 (1995) (reciting novel public trust uses such as recreating on the high seas). Even if McQueen's property is subject to the public trust by virtue of bordering on an artificial waterway, the state cannot simply mention the public trust and then completely eviscerate McQueen's property rights without a significant public trust purpose. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979). This constitutes a perversion of the public trust doctrine into an anti-growth tool, when its historical intent was to maximize efficient *use* of a significant resource. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 254 (1992). *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647 (1986).

The South Carolina Supreme Court cannot break with long-established precedents regarding the limitations, scope, and purposes of the public trust doctrine in a result-oriented decision to prevent McQueen from receiving compensation for the State's regulations which prohibit development of his property. With its disregard of procedural and substantive precedents, the decision below attempts to evade federal review South Carolina's abolition of McQueen's property rights

protected by the federal Constitution's Fifth and Fourteenth Amendments.

CONCLUSION

For the reasons stated above, this Court should grant McQueen's petition for a writ of *certiorari*.

Respectfully submitted,

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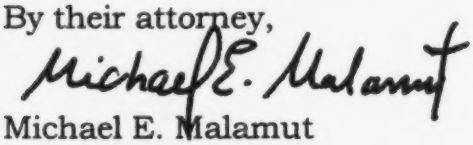
By their attorney,



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Dated: September 29, 2003

APPENDIX A

Rhode Island Supreme Court

No. 98-333-Appeal.

Anthony Palazzolo

v.

State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al.

Order

This case came before the Supreme Court in conference by virtue of a remand order from the Supreme Court of the United States *sub nom. Palazzolo v. Rhode Island, et al.*, 533 U.S. 606 (2001), 121 S.Ct. 2448, 150 L. Ed.2d. 592. On receipt of the Order of Remand from the Supreme Court of the United States, this Court requested counsel to file memoranda concerning the issues to be submitted to the Superior Court for purposes of conducting a trial of this case on remand. Pursuant to this directive, counsel for the parties and *amicus* counsel have filed memoranda, the most recent of which was filed in June 2002. After considering the memoranda and carefully analyzing the mandate of the Supreme Court of the United States, we hereby remand this case to the Presiding Justice of the Superior Court for an assignment to a trial justice in accordance with the following guidelines:

1. The trial justice will take all necessary evidence in order to determine the claim of Anthony Palazzolo for monetary damages against the State of Rhode Island for an alleged regulatory taking of his property by analyzing his reasonable investment-backed expectations in accordance with the principles enunciated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

2. In conducting this analysis, the trial justice should consider *inter alia* the effect of the Public Trust Doctrine as enunciated in *Greater Providence Chamber of Commerce,* et al. *v. Rhode Island,* 657 A.2d 1038 (R.I. 1995), on such reasonable investment-backed expectations.

3. The trial justice shall require that a complete survey of the *Palazzolo* property be filed with the Court prior to any hearing. This survey should establish, among other elements, the portion of the *Palazzolo* marshlands that are below the high-water mark of tidal effect.

4. The trial justice should consider the effect of the Public Trust Doctrine upon the limitations of title originally acquired by Mr. Palazzolo and his predecessor in title, Shore Gardens, Inc., in accordance with the principles enunciated in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Attention should be given to the doctrine as enunciated in *Shively v. Bowlby,* 152 U.S. 1, 57, 14 S.Ct.548, 569, 38 L.Ed. 331, 352 (1894).

5. The trial justice should also consider the effect, if any, of the doctrines of public and private nuisance upon Mr. Palazzolo's reasonable investment-backed expectations.

6. In the event that the trial justice should find that a regulatory taking of the *Palazzolo* land has occurred, he should then make appropriate findings regarding the measure of damages, if any, for such taking.

7. The trial justice shall make all necessary findings of fact and conclusions of law and thereupon render a judgment that will respond to all issues appropriately raised by the parties, including, but not limited to, the

issues set forth in the guidelines enunciated in this Order.

8. Either party who may be aggrieved by this judgment may appeal to this Court.

Chief Justice Weisberger (Ret.) participated in the deliberations relative to this Order.

Chief Justice Williams did not participate.

Entered as an order of this Court on this 24th day of June, 2002.

By Order,

s/Brian B. Burns

Clerk